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IN THE

Supreme Court of the United States

October Term, 1967

No. 763

HOWARD L. HOLTZENDORFF and BARBARA ROSIEN,
Plaintiffs and Respondents,

vs.

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, a body corporate and politic,
Defendant and Appellant.

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, a body corporate and politic,
Cross-Complainant and Respondent,

vs.

HOWARD L. HOLTZENDORFF,
Cross-Defendant and Appellant.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Four.

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IN THE

Supreme Court of the United States

October Term, 1967
No. .....

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, a body corporate and politic,

Petitioner,

vs.

HOWARD L. HOLTZENDORFF and BARBARA ROSIEN,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Four.

The Housing Authority of the City of Los Angeles hereby petitions for a Writ of Certiorari to review the decision of the Court of Appeal of the State of California, Second Appellate District, Division Four, entered in this case May 1, 1967.

Opinions Below.

The Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Four, is reported in 250 A.C.A. 667, 58 Cal. Rptr. 886 (1967). This Opinion affirms the judgment rendered in the Superior Court of the State of California, for

the County of Los Angeles November 10, 1964, awarding the amount of $218,199 in money damages against Petitioner, Housing Authority of the City of Los Angeles and $36,537.17 against the Respondent Holtzendorff in favor of Petitioner. The Opinion of the Court of Appeal is attached hereto as Appendix A. A Petition for Rehearing in the California Court of Appeal was denied May 18, 1967 and a Petition for Hearing to the Supreme Court of the State of California was denied June 28, 1967.

Jurisdiction.

The decision of the California Court of Appeal in this case was rendered on the 1st day of May, 1967. Petition for Rehearing within the time allowed therefor by rule of the Court was filed and said Petition was denied May 18, 1967. A Petition for Hearing to the Supreme Court of the State of California was timely filed and said Petition was denied June 28, 1967.

An Application for extension of time within which to file this Petition was filed with the Clerk of this Court on the 21st day of September, 1967 and was granted by Mr. Justice Abe Fortas on September 22, 1967, extending the time within which to file this Petition to and including October 25, 1967. The jurisdiction of the Supreme Court is invoked under the provisions of 28 U.S.C. Section 1257(3); 28 U.S.C. Section 2101(c), and the provisions of Rule 22.4 of the Revised Rules of the Supreme Court of the United States.

Questions Presented for Review.

After a Federal Agency (which Congress has charged with the responsibility of administering the Federal Low-rent Housing Program) has declared its contract in default, and by reason thereof has taken over possession, control and the administration of the Local Agencies projects and affairs, does:

(1) The Supremacy Clause of the United States Constitution require Local Courts to enforce the provisions of a uniform Federal Contract and declare void and unenforceable any contracts with individuals that are inconsistent with, or require the violation of such Federal Contract?

(2) The action amount to one against the United States with exclusive jurisdiction placed in either the Federal District Court or Court of Claims?

(3) The Local Court have jurisdiction to try the cause without making the Federal Agency a party to the action as an Indispensable Party?

(4) The right to audit and approve annually administrative expenditures prohibit the Local Authority from contracting with individuals for the performance of future Administrative services at a fixed amount for approximately seven years, without prior approval by the Federal Agency?

(5) The Local Agency have the right to divest itself of duties and obligations required to be preformed by Federal Statute and Contract in an employment agreement, which the Federal Agency has declared to be null and void.

Constitutional Provisions, Statutes and Regulations Involved.

The Constitutional provision involved is the Supremacy Clause of the Constitution of the United States (Article VI, Clause 2).

The Federal Statute involved is the United States Housing Act of 1937 (42 U.S. Code Sec. 1401 *et seq.*) The pertinent provisions are printed as Appendix B hereto.

The State statutes involved is the California Housing Authorities Law (California Health and Safety Code Sec. 34301 *et seq.*) The pertinent provision of which are referred to in the body of this petition or by footnote.

Statement of the Case.

A. The Purpose and Operation of the United States Housing Act of 1937 (42 U.S.C., Sec. 1401 et seq.) and Its Relationship With Local Agencies.

By the United States Housing Act of 1937 (42 U.S. Code, §1401, *et seq.*), Congress conceived the Federal low rent housing program to assist communities in providing safe, decent and sanitary housing for the lowest income groups of particular communities.

To qualify for the benefits under the U. S. Housing Act, each state is required to enact enabling legislation. In California this was done by the enactment of the California Housing Law in 1938 as set forth in Sections 34200-34402 of the California Health and Safety Code. In order for local communities to qualify under both the Federal and State law, the local governing body must by resolution declare a need for an authority to function (Sec. 34240 of the California Health and Safety Code). After the enabling resolutions have

been made and adopted the Public Housing Administration[1] makes available in various ways all capital funds necessary to build or construct the local project.

Basically, the Public Housing Administration provides the capital costs of a project, computes the interest on the bonds used to finance the project which are unconditionally guaranteed by the United States, and divides the total sum by 40 to determine the annual amount that may be required to be contributed by the Public Housing Administration.

The Public Housing Administration may make this grant only on the condition that the requirements of the U. S. Housing Act, as amended, are met. This Act, among other things, requires that each local authority enter into a standard form of annual contributions contract as was done in the instant case. Among the financial covenants and conditions of this contract are the requirements that:

> (1) The local authority shall at all times operate each project (a) solely for the purpose of providing decent, safe and sanitary dwellings (including necessary appurtenances thereto) within the fi-

[1]Under the authority of the Housing and Urban Development Act (5 U.S.C. 624) the Secretary of the Housing and Urban Development Administration created the Housing Assistance Administration (Secretary's Organization Order No. 12 dated June 23, 1966) and by Order effective July 1, 1966 (31 F.R. 8967) delegated the powers and authorities of the Secretary over the public low-rent housing program, with certain exceptions, to the Assistant Secretary for Renewal and the Housing Assistance Administration who, in turn, redelegated such powers to the Deputy Assistant Secretary for Housing Assistance effective July 1, 1966 (31 F.R. 8968).

Despite such changes, in order to avoid confusion and for purposes of consistency, however, the Public Housing Administration will still be referred to herein as the Federal agency charged with administration of the public low-rent housing program and in charge of the Appellant.

nancial reach of families of low income, and (b) in such manner as to promote serviceability, efficiency, economy and stability.

(2) All residual receipts or surplus must be paid to the Public Housing Administration or for its benefit.

(3) The local housing authority must operate within a proposed budget and it may not increase administrative expenses, among other things, without authority of the Public Housing Administration.

(4) If the local housing authority acts contrary to the annual contributions contract as determined by the Public Housing Administration, the improper expenditures may be disallowed, the contract declared in default, and title or possession of the projects relinquished to the Public Housing Administration.

By both the Annual Contributions Contract and State law, the Public Housing Administration has exclusive jurisdiction to determine whether or not a breach in the annual contributions contract exists or improper expenditure of funds derived directly or indirectly from the Federal Government has been made. In this regard, Section 407 of Part Two of the Annual Contributions Contract provides:

"The Local Authority shall not (1) at any time after the end of the Initial Operating Period for any Project incur any Operating Expenditures with respect to such Project except pursuant to and in accordance with an approved Operating Budget for such Project, nor (2) during any Fiscal Year or other budget period, incur with respect

to any Project total Operating Expenditures, nor expenditures for management expense, miscellaneous authority expense, establishment of reserves, or operating improvements in excess of the respective amounts therefor shown in an approved Operating Budget (including revisions thereof) governing such Fiscal Year or other budget period" . . .

This right of the Federal Government is specifically approved and set forth in Section 34327.5 of the California Health and Safety Code which states:

"Whether or not the type, amount, and manner of expenditure of any funds received by an authority from the Federal Government, or any funds derived from such funds, are in accordance with the law or contract under which the funds were received, or any applicable federal regulations, shall be matters to be determined exclusively by the federal agency. This section is not intended, and shall not be construed, to prohibit prosecution and conviction of violation of any law of this state."

Thus, the question as to whether or not the annual contributions contract has or has not been breached in the instant case is left solely to the determination of the Public Housing Administration. The Public Housing Commissioner took the position that the contracts were void and unenforceable and by reason thereof, the appellant had breached the contract.

B. Status of Petitioner.

Petitioner is a public corporation and was one of the first local housing authorities created in the State of California and qualified under the California Health

and Safety Code §3420, *et seq.*, enabling legislation known as the Housing Authorities Law.

Petitioner operates by and through five appointed commissioners to serve for staggered terms without compensation pursuant to §34272 of the California Health and Safety Code. The members of this commission are appointed by the Mayor of the City of Los Angeles.

The United States Housing Act of 1937 requires all local housing authorities operating under Federal loans to be a party to the standard form Annual Contributions Contract. Petitioner has been a party to such a contract since 1938. This contract which was attached to Petitioner's motion to join the Public Housing Administration as an indispensable party provided that the Public Housing Administration would lend to Petitioner the capital costs of its low rent housing projects by guaranteeing bonds issued and to be repaid over a period of forty years. That a part of the condition for obtaining such capital loans was that the Public Housing Administration had the right to approve expenditures contained in the annual budget of Petitioner for its administrative and project expenses for each fiscal year. The determination as to whether or not the type, amount, manner and expenditure of any funds received by Petitioner from the Federal Government or any funds derived from such funds, are in accordance with the law or contract under which the funds were received or any applicable Federal regulations are matters to be determined exclusively by the appropriate Federal Agency (California Health and Safety Code §34327.5.)

C. Facts Surrounding the Present Litigation.

At the time the complaint, subject of this litigation, was filed in the Superior Court of the State of California in and for the County of Los Angeles, the Public Housing Administration, the Federal Agency charged with the duties of the administration of the Housing Act of 1937, had determined that the contracts in question constituted a breach of the Annual Contributions Contract and had taken possession of all of Petitioner's housing projects and funds and was in active operation of Petitioner.

At the time that the contracts, subject of this litigation, were executed, Respondent Holtzendorff was then under contract to Petitioner to act as Executive Director with an annual salary of $17,500 to expire December 31, 1962 and Respondent Rosien was then under contract to Petitioner to act as Assistant Executive Director with an annual salary of $12,468 to expire December 31, 1963.[2]

On December 4, 1957, Respondent Holtzendorff was indicted by the Los Angeles County Grand Jury on multiple counts of embezzlement of public moneys and falsification of public records arising out of alleged orders and directions given to subordinates to use property and services of employees of Petitioner in support of the then Mayor Bowron's re-election campaign. After an appeal (*People v. Holtzendorff*, 177 Cal. App. 2d 788) based upon Respondent Holtzendorff's motion under California Penal Code Section 995 he was acquitted of the charges on November 14, 1960.

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[2]The employment contracts of Respondents, subject to the within action are set forth as Appendix E.

On November 29, 1960, Respondent Holtzendorff presented to the Commissioners of Petitioner a claim for reimbursement of legal fees and expenses in the amount of $36,537.17 incurred in connection with the defense of his prosecution which sum was paid by Petitioner November 30, 1960.

On April 19, 1961, new contracts containing similar provisions to the then existing contracts were entered into by the Petitioner and Respondents providing, however, for increase in annual wages of approximately $4,000 each. The term of said contracts was for over six years and eight months and these contracts by the last paragraph thereof rescinded the existing similar contracts. A majority of the terms of the then existing members of the Board of Commissioners of Petitioner had terms that were to expire prior to the dates of the then existing contracts and on July 2, 1962, four new commissioners of Petitioner were appointed.

On December 4, 1962 Respondents filed actions against Petitioner for declaratory relief concerning the validity of the contracts in question.

On March 26, 1963 Respondents were discharged from duty as Secretary and Executive Director and Assistant Secretary and Assistant Executive Director of Petitioner.

By letter dated April 16, 1963, Respondents were notified through their attorney, Herman F. Selvin, that Marie C. McGuire, Commissioner of the Public Hous-

ing Administration had taken possession of the Housing Authority of the City of Los Angeles, Petitioner herein.[3]

This action was commenced April 18, 1963 by the filing of the complaint for breach of contract and writ of mandamus and proceeded to trial on Respondents' amended complaint for breach of contracts and declaratory relief and Petitioner's answers thereto and Petitioner's cross-complaint filed May 4, 1964 and Respondents' answer thereto.

The cause was tried in two parts consisting of the trial of legal issues, the Court sitting without a jury, and the main trial on the factual issues, the Court sitting with a jury. At the conclusion of the main trial the jury awarded judgment in favor of Respondent Holtzendorff in the sum of $122,661 and Respondent Rosien in the sum of $85,538, a total of $218,199. By stipulation of the parties through their respective counsel, all matters introduced at the main trial and the trial of the legal issues, together with the proceeding in the case of *People v. Holtzendorff,* 177 Cal. App. 2d 788, the issues with respect to Petitioner's cross-complaint were submitted to the Court for decision sitting without a jury. Thereafter, the Court awarded a separate judgment for Petitioner against Respondent Holtzendorff in the sum of $36,537.17.

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[3]The Public Housing Administration was superseded by the Housing Assistance Administration on July 1, 1966 which remained and now is in possession of the low rent projects of Petitioner.

How the Federal Questions Were Raised and Decided Below.

The question as to whether the State Court had jurisdiction to try the cause without making the Public Housing Administration a party to the action was raised on two occasions by motions to join that Federal Agency as a party to the action. The first occasion was an oral motion made at the time of the hearing on Petitioner's Demurrer to the original complaint, which motion was denied May 10, 1963 [Clk. Tr. p. 17]. On November 1, 1963 the Trial Court granted permission for Petitioner to renew said motion. Pursuant thereto, Petitioner filed its notice of motion and supporting affidavits[4] upon this question and on May 10, 1964, said motion was again denied.

Following the entry of judgment by the Trial Court, Petitioner gave Notice of Appeal and among the assignments of error, argued to the California Court of Appeal the following:

I.

"THE COURT BELOW LACKED JURISDICTION TO TRY THE CONTROVERSY.

The Trial Court erred in denying Petitioner's motion to join the Public Housing Administration as an indispensable party to the action and was therefore without jurisdiction to try the controversy and that the Public Housing Administration in its current capacity

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[4]The Supporting Affidavit of Marie C. McGuire, Commissioner of the Public Housing Administration was extensively referred to in Respondents' Reply Brief, footnote No. 76, page 130 and for the convenience of the Court, has been attached hereto as Appendix No. C.

of holding possession of and operating Federally aided low rent projects of Petitioner is the real party in interst."

Petitioner further, in the California Court of Appeal, brought to the Court's attention that the failure to join the Public Housing Administration was a jurisdictional issue in the State of California and could be raised at any time even on appeal. In its Opinion, the California Court of Appeal held:

> "There is no merit in the Authority's argument that the federal Public Housing Administration (PHA) is an indispensable party to this action. The argument ignores one decisive fact—the subject matter of the action, which is the Authority's breach of a contract to which PHA was not a party and in which it had no justiciable interest of any kind[2] . . . Nor has PHA any interest at all, let alone one that would be jeopardized by a judgment 'between the parties.'"

This ruling was made despite the fact that both the Trial and the Appellate Court were presented with the "take-over agreement" whereby the Public Housing Administration took possession and operation of all of Petitioner's projects. The pertinency and legal effect of this agreement is more fully discussed hereafter, however, the same has been attached hereto as Appendix C.

The Federal interest in this litigation was the subject of a Stipulation between the parties in the Trial Court,

which Stipulation was set forth verbatim in Petitioner's Reply Brief before the California Court of Appeal at pages 51 and 52.[5]

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[5]Said stipulation provided as follows:

"The Court: I think it would be in order to have a stipulation stating the relationship between the Housing Authority and the Federal Government.

"Mr. Selvin: Well, I am prepared to offer a stipulation in that regard. The acquisition of the property and the construction of the building projects, as I understand it, are in the first instances financed either by loans from the PHA or by PHA's guarantee of loans made to the Housing Authority by private agencies, and repayment of those loans, of course, is an obligation of the local Housing Authority.

"In addition, for the purpose of enabling the local Housing Authority to charge low rents, there are annual contributions by the PHA or the Federal Government to the Housing Authority, thus in part subsidizing their operations.

"Rentals and other sources of income from the projects, as distinguished from the sources of income that are represented by the operation reserve fund, are used in the first instance to pay operating expenses.

"If there is any surplus, that surplus, as I understand it, is allocated to the PHA in payment or partial repayment of the loans that it has made or guaranteed. Those arrangements are represented by contracts between PHA and the Housing Authority, and pursuant to those contracts and to protect and administer the PHA fiscal interest in the operations of the Authority, there are provisions for these periodic audits and reviews. Very generally and somewhat sketchily, I think that is somewhat the situation, Mr. Hildreth.

"Mr. Hildreth: I think the statements are substantially correct. However, your Honor, with the one correction that the surplus, that is to say, if the Housing Authority operates at a profit, which creates a surplus, this money is accredited to the Federal Government. They get the money—rather, they reduce the annual contributions contract so that they have a direct economic interest.

"Mr. Selvin: I thought I mentioned that the surplus went to the Federal Government. If I didn't make it clear, I accept your clarification of it." . . . [Rep. Tr. p. 648, line 13, to p. 649, line 24.]

"Mr. Hildreth: Excuse me before we go into that. I planned to offer some additional evidence. I am informed that there are two contracts, one of which, the surplus goes directly to the Federal Government, and the other, the sur-

These matters were presented to the California Supreme Court in Petitioner's Petition for Hearing and which hearing was denied June 28, 1967.

REASONS FOR GRANTING THE WRIT.

A. The Rendition of This Judgment, the Enforcement of Which Requires the Breach of Federal Statute and Contract, Conflicts With Prior U.S. Supreme Court and Circuit Court Decisions Interpreting and Applying the Supremacy Clause.

Petitioner contends that the decision of the California Court of Appeal is in irreconcilable conflict with an unbroken line of decisions by the U.S. Supreme Court commencing with *Gibbons v. Ogden,* 9 Wheat. 1, 211, 6 L. Ed. 23, through such recent decisions as *Sperry v. Florida Ex rel. Florida Bar,* 373 U.S. 379 and *Leslie Miller, Inc. v. Arkansas,* 352 U.S. 187.

The Opinion of the California Court of Appeal has placed Petitioner's present Board of Commissioners in the untenable position of being charged with the payment of a judgment out of low rent housing authority funds over which they do not have control. The expenditure of these funds is subject to and under the control of the Public Housing Administration which has declared that the contracts in question were void

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plus goes to reduce their amount to the Authority so that there is that minor distinction.

"The Court: All right.

"Mr. Selvin: Instead of shipping the money to Washington and getting it back from Washington in the form of a check, they simply reduce the check that Washington sends out.

"Mr. Hildreth: That is correct.

"Mr. Selvin: I will accept that." . . . [Rep. Tr. p. 650, lines 5-17.]

and unenforceable and that no low rent funds could be used to discharge any such contractual obligations.

The California Court by not recognizing the interests of the Public Housing Administration and making it a party to this action, has created this impossible situation.

Petitioner moved to join the Public Housing Administration on May 10, 1963 and again with the permission of the trial court on May 21, 1964. These motions were denied which were error.

Section 389 of the California Code of Civil Procedure provides:

> "A person is an indispensable party to an action if his absence will prevent the *court from rendering any effective judgment between the parties* or would *seriously prejudice any party before the court* or if *his interest would be inequitably affected or jeopardized by a judgment rendered between the parties.*" (Emphasis added.)

Enforcement of the California Court of Appeal decision in the present case necessarily conflicts with Federal statute and contract. Petitioner, acting through its Commissioners on the one hand, are required by this judgment to pay the same through the use of Federally audited, controlled and possessed funds. To do so would require the Commissioners to act contrary to the determination of the Commissioner of the Public Housing Administration, its Federal Annual Contributions Contract, and the use of funds over which they do not now or have ever had the ultimate right of control. The fact that the Annual Contributions Contract was breached by the execution of the Respondents' em-

ployment agreements has never been challenged but was always brushed aside by both the California Trial and Appellate Courts as immaterial and was never considered. The plain effect of the California decision is to interpret the Federal contract and its enabling statutes contrary to the interpretation put upon the statute and the contract by the Federal Agency which is given exclusive jurisdiction to so interpret by both State and Federal statute.

Certainly the decision of the California Court of Appeal is contrary to intent of Congress in passing the United States Housing Act of 1937 and the ruling of *Johnson v. Oakland Redevelopment Agency* (1962, 9th Cir.), 317 F. 2d 872.

See also:

Free v. Bland, 369 U.S. 663;

Public Utility Commission of California v. United States, 355 U.S. 543.

The effect of the California Court of Appeal decision was to allow local commissioners to disregard the Federal Agency contracts and Federal Statutes in the expenditure and control of funds and policy, contrary to a prior determination of the Federal Agency involved.

Recognizing the application of the Supremacy Clause, and acknowledging that the prior commissioners of Petitioner by merely entering into a written employment contract could wholly defeat the rights and obligations reserved to a Federal Agency, the California Court of Appeal has ruled that the ordinary law of contracts in the State of California shall prevail over Federal Statute and contract as construed by Federal courts and agencies. The California Court of Appeal accomplished

this result by finding that the Public Housing Administration "had no justiciable interest of any kind" . . . "nor" any interest at all, let alone one that would be jeopardized by a judgment "between the parties."[6]

This result was further made possible by refusing to make the Public Housing Administration a party to the action, recognizing the fact that the Federal agency was in actual possession and control of Petitioner's projects and operations or the impelling and overriding interest in the low-rent housing program for which all funds are Federally supplied. It is Petitioner's contention that this finding is in error as discussed hereafter.

B. In Fact and in Law the Judgment of the California Court of Appeal Is a Judgment Against the United States Rendered in Its Absence.

This Petition is predicated on a judgment which is in fact and law one against the United States rendered by the California State Courts without jurisdiction to entertain the action.

Prior to filing this action, Marie C. McGuire, then Commissioner of the Public Administration, had declared that a substantial breach existed in the Annual Contributions Contract between Petitioner and the Public Housing Administration. Pursuant to this declaration, Petitioner, by Resolution dated April 11, 1963 and by contract[7] dated April 12, 1963, transferred and de-

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[6]Decision of the California Court of Appeal Appendix A, pages 31 and 32.

[7]Relevant parts of said contract Appendix C provides:

"1. In accordance with the applicable provision of said Contracts federal financial assistance contracts) the local

livered possession of all of its Federally aided and assisted projects to the Public Housing Administration. From that date to the present the Public Housing Administration was and is the Housing Authority of the City of Los Angeles. Respondents Holtzendorff and Rosien were notified of this action by letter dated April 16, 1963 through their attorney, Herman F. Selvin, two days prior to the filing of the complaint for breach of contract and subject of the judgment rendered against Petitioner. At the time the suit was filed, appeal heard, and now, all powers, rights and duties of Petitioner were vested in and exercised by the United States acting by and through the Commissioner of the Public Housing Administration. Petitioner has at all times been without power to honor the judgment rendered; only the Public Housing Administration or its successor in interest can do so.

Authority hereby delivers to Public Housing Administration possession of the said Projects as constituted on the date of the aforementioned resolution, including all real property with all easements, rights-of-way, and all incorporeal hereditaments there unto belonging or in anywise appertaining, and all personal property, tangible and intangible, or interest therein held in connection with such projects, including (but not limited to) equipment and apparatus, supplies, monies on hand and on deposit, reserves, securities, accounts receivable, choses in action, leases, contracts books of account, papers and records, and the Public Housing Administration hereby accepts such delivery and possession.

"2. During the period in which the Public Housing Administration holds possession of the Projects it may, in the name of and on behalf of the Local Authority or in its own name and on its own behalf, exercise any or all of the rights and privileges of the Local Authority pursuant to the Contracts and perform any or all of the obligations and responsibilities of the Local Authority pursuant to said Contracts . . ."

The Judgment Rendered in the Court Below Is One That Would Be Paid by the Public Housing Administration and Actually Would Come From the Treasury of the United States.

The Opinion of the California Court of Appeal overlooks the fact that the U. S. Housing Act (42 U.S.C. Sec. 1421a(c)), and Part Two of the Annual Contributions Contract, Sec. 424, provide that the faith of the United States is pledged to the payment of the annual contributions to the local authorities. Further, no action or inaction by petitioner, whether *ultra vires,* illegal or irresponsible, can relieve the Public Housing Administration of this obligation.

Eeach local housing agency is subject to a periodic audit and in addition to being required to maintain the basic policies of the United States Housing Act, it is required to show that it is operated in a manner so as to promote serviceability, efficiency, economy and stability. This audit further determines the amount of the excess of income received over the actual costs of operation.

The amount of monies needed to pay off the petitioner's bonded indebtedness, annually appropriated by the Congress of the United States as annual contributions, is drastically affected by the efficiency of the operation of the projects by petitioner. Thus, any expense of the local housing authority comes out of the Treasury of the United States. The fact of this interest of the Public Housing Administration was before the court by a stipulation between the parties as more particularily set forth hereafter.

It is uncontroverted that the salaries of both Holtzendorff and Rosein were properly chargeable to the

general funds of the low-rent projects. This judgment, if enforced would thus be chargeable against funds received from the Public Housing Administration within the meaning of Section 1410 of the U. S. Housing Act. The amount of surplus would be lost to the Public Housing Administration forever as well as the amount required for the depletion of the authorized reserves.

The financial interest of the Public Housing Administration in the operating expenses as well as all other expenses of petitioner gives it a direct interest in the existence and validity of the "employment contracts" in issue in this suit. This is recognized and protected in such explicit detail as to render the Public Housing Administration an indispensable party to this suit.[8]

The effect of this judgment is obvious. The Public Housing Administration will be required ultimately to pay it without even having had the opportunity to be a party before the court.

This Action Was Brought in the Wrong Forum.

The jurisdiction for suits against the United States is set forth in 28 U.S.C. 1346(2) and 28 U.S.C. 1491

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[8]The sections of the U. S. Housing Act recognizing and protecting the interest of the Public Housing Administration are as follows: 41 U.S.C. Section 1402(1), defines low-rent housing to be that developed and administered to promote serviceability, efficiency, economy and stability; Section 1410(a), (b), (c) and (f), sets forth the authorization for the annual contributions in assistance of low-rent housing projects and the conditions therefor; Section 1413(a) provides for the foreclosure of any property or the enforcement of any right conferred by any law, contract or other agreement or take possession of any project in connection with which it has made a loan account contribution or capital grant; Section 1415(3) provides for the right to insure the low-rent character of housing projects by reducing or terminating the annual contributions payable under an annual contract in the event of a substantial breach of a condition of that contract.

(2) and only courts having jurisdiction of the subject matter would be the U.S. District Court or the U.S. Court of Claims.

Clearly, once the Public Housing Administration had declared a breach existed in the Contractual relations between Petitioner and that agency and had taken possession and control of all Petitioner's projects, that Agency was the real party in interest to this litigation, and in fact the Housing Authority of the City of Los Angeles.

Under these circumstances it is respectfully submitted that this action was one against an agency of the United States and as such the California Courts had no jurisdiction to entertain it. The action properly belongs in either the United States District Court or Court of Claims.

C. The United States Housing Act Requires the Public Housing Administration to Carry Out the Intent and Policy Declared by Congress Which Is More Than a Mere Economic Interest.

Thousands of persons reside in the low-income projects, which generally provide the only decent housing available to them because of their poverty. The purpose of federally supported low-income housing is set forth in 42 U.S.C. §1401:

> "It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and

> their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and unsanitary housing conditions and acute shortage of decent, safe, and sanitary dwellings for families of low income, in urban and rural non-farm areas, that are injurious to the health, safety and morals of the citizens of the nation . . . It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of the Authority) with due consideration to accomplishing the objectives of this chapter while effecting economies."

The Public Housing Administration had not only the right to complain about Respondents employment agreement from the financial respect but also the abdication by Petitioners former Commissioners of their duties and responsibilities. That Federal Agency has no right to contract with individuals to perform the functions of administering the low-rent program and in turn the local Authority may not do so either. The employment agreements, Appendix E, on this subject state:

> "The powers, duties, and functions of the employee shall be administrative only and at all times shall be in accordance with the By-Laws and Manual of Policy as established or changed by the

Commissioners from time to time. *However, in this connection, it is mutually understood and agreed that the nature and scope of said administrative duties will neither be increased nor decreased during the period of this Agreement without the written consent of the employee."* (emphasis added).

The provision of changing the nature or scope of the administrative duties without the consent of plaintiff divests future commissioners of the power expressly given them in Section 34275 of the California Health and Safety Code. It, in fact, precludes the future commissioners from amending the By-Laws of the defendant public corporation or the Manual of Policy concerning the operation of the commission.

As more particularly shown hereafter, it is the duty of the commission in office from time to time to exercise sound discretion to operate the Housing Authority in the best public interest. This, by the very nature of the duty requires that the Housing Authority examine from time to time its operation and to make such changes as necessary in the public interest, which changes would necessarily include the modification of the duties of the executive director and assistant executive director, due to the changes of conditions or circumstances certainly not reasonably foreseeable at the time the contract was executed. To say that the operation of the Housing Authority must remain static for a period of six years or perhaps longer certainly must be declared void in light of the quoted companion sections.

D. By Reason of the Annual Contributions Contract the Public Housing Administration Has a Direct and Basic Interest With Respect to the Efficient Operation of Each Project and to See That the Projects Are Operated in a Manner to Promote the Purpose of the United States Housing Act.

The right of the Public Housing Administration to approve or disapprove contracts involving the expenditure of low rent housing funds is not limited to the financial interests of that agency. There is an equally compelling reason why the Public Housing Administration should be joined as an indispensable party in litigation of this nature. The low rent housing program as conceived and promulgated by the United States Housing Act of 1937 (42 U.S.C. 1401, *et seq.*) charges the Public Housing Administration with the duty of seeing that local agencies operate their low rent housing programs in an orderly, efficient and economical manner. To that extent the Board of Commissioners of each local Authority and their executive officers must be guided by the advice, counsel, rules, and regulations of the Public Housing Administration.

As further evidence of the intent of Congress that the Public Housing Administration should be charged with the public duty requiring it to be ultimately responsible for the carrying out of the public low-rent housing program, Section 22 of the United States Housing Act of 1937 (42 U.S.C. 1421a) provides for the inclusion in every Annual Contributions Contract entered into between the Public Housing Administration and a Local Housing Authority of a requirement that:

> ". . . upon the occurrence of a substantial default in respect to the covenants or conditions to which

the public housing agency is subject (as such substantial default shall be defined in such contract), the public housing agency shall be obligated at the option of the Authority, either to convey title in any case where, in the determination of the Authority (which determination shall be final and conclusive), such conveyance of title is necessary to achieve the purposes of this Act, or to deliver possession to the Authority of the project, as then constituted, to which such contract relates: . . ." ["Authority" as used above refers to the Public Housing Administration and "public housing agency" refers to a local housing authority.]

In accordance with such requirement, such a provision was included in the Annual Contributions Contracts entered into between the Public Housing Administration and petitioner covering their low-rent projects.

In accordance with said statutory and contractual provisions an agreement was entered into between the petitioner and the Public Housing Administration under date of April 11, 1963, whereby the petitioner transferred possession and control of all its public low-rent housing projects to the Public Housing Administration. Under the provisions of said agreement Public Housing Administration has been in possession and control of said projects from that date until the present time, and is still in possession and control of such projects, charged with the sole responsibility and authority for their management and operation and authorized to exercise any or all of the rights and privileges and to perform any or all of the obligations of the petitioner in connection with such projects.

It is perhaps appropriate here to call the Court's attention to the provision of the disputed "contract" whereby the Board of Commissioners was prohibited during the term of such "contract" from either increasing or decreasing the duties of the Executive Director without his consent. As stated the position of the Executive Director in the similar case of *Mitchell v. Chester Housing Authority,* 389 Pa. 314, 132 A. 2d 873 (878), "His relationship to the Authority was so close and so confidential that it may be said that, for most purposes, he was in fact the . . . Housing Authority in action."

This low-rent housing program cannot be efficiently and successfully conducted unless there exists a mutual confidence and the highest degree of cooperation between the Executive Director and the Board of Commissioners. To allow such a contract as this to be entered into which would extend into a period when such mutual confidence and cooperation no longer existed would certainly most seriously hamper this program in which, not only the State of California, but the Federal Government as well as such a vital interest. It is very clear from the evidence in this case that such confidence and cooperation no longer existed between the Board of Commissioners and the former Executive Director and his Assistant for some months before their services were terminated.

It is respectfully submitted that the Public Housing Administration, having been created for the purpose of administering the low-rent housing program in furtherance of the general welfare of the nation, is an indispensable party to this proceeding because the very issue to be resolved is whether, in fact, the Housing

Authority was being operated in a manner consistent with the purposes and objectives of the low-rent program. It is further submitted that the issue to be resolved will affect not merely the individual litigants to this action, but will have a far-reaching effect on the low-rent program throughout the nation. Such considerations, we respectfully submit, make it mandatory that the Public Housing Administration be joined in this action.

Compare *National Licorice Co. v. National Lab. Rel. Board,* 309 U.S. 350, 84 L. Ed. 799 (1940). In that case one of the questions presented was whether the National Labor Relations Board had the authority, even in the absence of the employees as parties to the proceeding, to order an employee not to enforce contracts with its employees found to have been procured in violation of the National Labor Relations Act and to contain provisions violating that Act. In determining that the Board had such authority, the court gave considerable weight to the fact that the "Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining" (309 U.S. at 362, 84 L. Ed. 810). The opinion continues (309 U.S. at 363-364, 84 L. Ed. 810):

> "In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights. * * *
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> * * *
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> "Here the right asserted by the Board is not one arising upon or derived from the contracts be-

tween petitioner and its employees. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices * * *."

Compare also *Scripps-Howard Radio v. Federal Commun. Com.*, 316 U.S. 4, 86 L. Ed. 1229 (1942) and *Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 81 L. Ed. 789 (1937) where the Supreme Court recognized the courts as "instruments for realizing public purposes" (316 U.S. at 15, 86 L. Ed. at 1237) and noted that "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved" (300 U.S. at 552, 81 L. Ed. at 802).

In the instant case, the Public Housing Administration is the "responsible administration of the properties involved" because it has taken actual possession of the property under Section 501 of the Annual Contributions Contract. Under the provisions of Section 505 of the Contract, during the period in which the Public Housing Administration holds possession "it may, in the name of and on behalf of the Local Authority or in its own name and on its own behalf, exercise any or all of the rights and privileges of the Local Authority pursuant to this Contract and perform any or all of the obligations and responsibilities of the Local Authority pursuant to this Contract."

It is essential that the housing be operated as economically and efficiently as possible so that the lowest income group in the community may be served. An inefficient, uneconomical operation will result in higher

operating costs and a possible deficit. Operating costs are the responsibility of petitioner and will not be borne by the Public Housing Administration. In the event of an operating deficit, petitioner will be required to either reduce operating expenses or increase the rents paid by the low-income tenants. Any increase in rents affects and endangers the low-rent character of the projects. An operating deficit may result in such an increase in rents as to cause the projects no longer to be operated as low-rent housing and, consequently, constitute a breach of the Annual Contributions Contract. Furthermore, if the projects are not operated with efficiency and economy, even though it might still be possible to operate them as low-rent housing, this would also constitute a breach of such contract. (Section 201 of Part II of the Annual Contributions Contract.)

This interest and the basic right to protect it is demonstrated by the right of the Public Housing Administration to conduct annual audits of the local authorities with respect to rents or revenues received from the projects.

It is true that Public Housing Administration has no right to dictate to the Commissioners of petitioner as to the person they shall appoint as executive director. The authority to make such appointment is solely within the discretion of the Commissioners. However, when the relationship between the executive director and the Board of Commissioners deteriorates to such

an extent that the projects cannot be operated in such a manner as to promote serviceability, efficiency, economy and stability and such operation is in danger of not being within the financial reach of families of low income, then the annual contributions contract has been violated. (See Section 20, Part II of the Annual Contributions Contract). The Public Housing Administration then very definitely has an interest in remedying such a situation.

The Federal Government has the power to audit and approve all expenditures made in connection with funds received from low rent housing projects. The Federal Agency having taken the position that the personal service "contract" was a breach of the Annual Contributions Contract and by virtue of the California Health and Safety Code, Sec. 34327.5 which grants the exclusive determination of this question to the Federal Government, it appears axiomatic that the Public Housing Administration is an indispensable party to this action.

The rule in California as enunciated by the California Supreme Court since the very early cases of *Berryman v. Perkins,* 55 Cal. 483 and *Cosner v. Colusa County,* 58 Cal. 274, has always been that the right to approve action specifically implies the right to disapprove said action. This rule applied to the instant litigation would thus give the Public Housing Administration the right to disapprove of the salaries and other matters relating to the employment contracts of

Petitioner's Executive Director and Assistant Executive Director.

Conclusion.

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JACK E. HILDRETH and
RICHARD R. ROGAN,
Attorneys for Defendant, Appellant, Cross-Complainant, Respondent and Petitioner.

Of Counsel:
HARVEY A. SNIDERMAN,

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Howard L. Holtzendorff and Barbara Rosien, Plaintiffs and Respondents, v. Housing Authority of the City of Los Angeles, a body corporate and politic, Defendant and Appellant.

Housing Authority of the City of Los Angeles, a body corporate and politic, Cross-Complainant and Respondent, v. Howard L. Holtzendorff, Cross-Defendant and Appellant. 2d Civ. 29865 and 29866.

Filed May 1, 1967.

Appeals from judgments of the Superior Court of Los Angeles County. Leonard A. Diether, Judge, Affirmed.

Jack E. Hildreth, Rogan & Radding, Harvey A. Sniderman and Richard R. Rogan for Defendant and Appellant, and Cross-Complainant and Respondent.

Loeb and Loeb and Herman F. Selvin for Plaintiffs and Respondents, and Cross-Defendant and Appellant Holtzendorff.

This is an action to recover damages for the wrongful discharge of plaintiffs under their respective employment contracts with defendant. Holtzendorff was awarded $122,661 and Miss Rosien $85,538. Defendant has appealed.

Under its cross-complaint against Holtzendorff, defendant Housing Authority sought to recover money that it had paid to Holtzendorff to reimburse him for

attorney fees and expenses in connection with certain criminal proceedings taken against him that grew out of his political involvement with defendant. Judgment was rendered in favor of the Housing Authority for $36,537.17 plus interest making the total amount of the judgment on the cross-complaint $38,442.16. Holtzendorff has appealed.[1]

The housing Authority of the City of Los Angeles is a public corporation created pursuant to the Housing Authorities Law of the Health and Safety Code of this state (§§ 34200, et seq.) which was enacted by the Legislature to qualify local housing bodies for federal loans under the United States Housing Act of 1937. (42 U.S. Code, § 1430.) The Authority operates by and through five appointed commmissioners who serve for staggered terms without compensation pursuant to section 34272 of the Health and Safety Code. The members of this commission are appointed by the Mayor of the City of Los Angeles, subject to approval by the City Council.

Plaintiff Holtzendorff was hired as executive director, secretary and treasurer of the Housing Authority on February 1, 1941, and served under various written agreements until his discharge on March 26, 1963. Plaintiff Rosien was initially employed on July 26, 1938, and served under various written agreements as assistant executive director and assistant secretary until

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[1]By stipulation and pursuant to pretrial order the issues raised by the first amended complaint and the answer (the main case) were tried separately from the issues raised by the cross-complaint and the answer thereto re the recovery of reimbursement funds, and separate judgments were rendered in accordance with stipulations and pretrial order.

It was further stipulated (and with court approval) that certain legal issues in the main case should be separately tried by the court sitting without a jury, prior to trial by jury of the issues involving the "discharge" of plaintiffs.

her discharge, also on March 26, 1963. At the time plaintiffs were discharged they were each serving under an employment contract with the Housing Authority which was executed on April 19, 1961,[2] for a term expiring on December 31, 1967. Each of these contracts provided that the employee's compensation shall consist of (a) salary—$21,700 per year for Holtzendorff and $16,500 per year for Miss Rosien; (b) the same vacation, sick leave, social security, health and welfare, life insurance and retirement benefits as during the term of employment, were granted to other employees, and (c) the exclusive use of one of the Housing Authority's passenger vehicles.

Holtzendorff's contract provided that he was employed "in the administrative capacity of Secretary, Executive Director and Treasurer" to serve the Authority in operating its housing developments (of which there were 21 in number representing a capital investment of $63,500,000), and in the construction or operation of other housing developments, all "under the supervision and control of the Commissioners of the Authority." His powers, duties, and responsibilities were to be "administrative only and at all times in accordance with the By-laws and Manual of Policy and Procedure as established or changed by the Commissioners of the Authority from time to time." It was agreed, however, "that the nature and scope of said administrative duties will neither be increased nor decreased" during the pe-

[2]At the time these contracts were executed, each of the plaintiffs had a similar employment contract with defendant. Holtzendorff's contract was executed December 18, 1956 and expired December 31, 1962, and provided for a salary of $17,500 per annum. Miss Rosien's contract was entered into February 19, 1958, and expired December 31, 1963, at an annual salary of $12,468.

riod of employment without the employee's written consent. It was also agreed that the employee did not have and would not be authorized to have delegated to him any police-making responsibilities or authority of any kind, but that all such power was reserved to the commissioners to be exercised only by them. Miss Rosien was employed as assistant secretary and assistant executive director to serve under the general supervision of the secretary and executive director. Her duties were similarly limited to those that were administrative only, performable in subordination to the policy and procedures established from time to time by the Authority's commissioners.

On May 18, 1954, the Housing Authority created the operation reserve fund (sometimes referred to as fund five), in the sum of more than $185,000, which funds were derived from the operation and sale of temporary war housing projects. Holtzendorff was given authority to expend up to $1,000 for any single purpose from this fund without prior commission approval when such expenditures were in the best interests of the Housing Authority. Holtzendorff's authority with respect to expenditures was later increased to $5,000 by amendment to the Manual of Policy and Procedures.

As of April 1, 1954, the Housing Authority entered into a contract with the Continental Assurance Company to purchase annuities for all employees who were employed by the Authority on or about April 16, 1950, without cost to them, and agreed to pay one-half of the cost of annuities for those employees in the service of the Housing Authority as of April 1, 1954, provided said employees would pay the other one-half of said costs. This agreement was designated the basic retirement plan.

On April 21, 1959, defendant adopted a resolution to purchase certain annuities under a plan designated as the supplementary retirement fund. This fund was originally funded October 1, 1960, by the payment from defendant's operation reserve fund five of the sum of $59,338.86. This fund was solely for the benefit of the employees of defendant who had been continuously employed since April 1954, and a member of defendant's basic retirement plan. No part of the supplementary retirement fund was paid by defendant's employees and the employees' rights in this fund immediately vested after they had been continuously employed by defendant for fifteen years. The plan further provided for future benefits to be paid solely by defendant.

On December 4, 1957, Holtzendorff was indicated by the grand jury of Los Angeles County on 21 counts of embezzlement of public monies in violation of section 424, subdivision 2 of the Penal Code and on 21 additional counts for the same felony in violation of section 504 of said Code and on 10 counts of falsification of public records in violation of section 424, subdivision 3 of said code. Holtzendorff made a motion under section 995 of the Penal Code to set aside the indictment which was granted. Appeal was taken, and the District Court of Appeal in *People v. Holtzendorff*, 177 Cal.App.2d 788,[3] on February 15, 1960, reversed the order as to all counts charged in violation of section 504 and affirmed it as to all other counts.

On November 14, 1960, the defendant was found not guilty on the counts charging a violation of said section 504.

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[3]Hearing was denied by the Supreme Court.

On November 29, 1960, Holtzendorff presented to the defendant a claim for reimbursement of legal fees and expenses incurred by him in connection with his defense in the amount of $36,537.17. This claim was approved and paid November 30, 1960. It is this item that forms the foundation of the defendant's cross-complaint against Holtzendorff.

On July 2, 1962, four new commissioners were appointed to the defendant Housing Authority. About a week later the commissioners adopted a resolution providing in part that Holtzendorff should consult the chairman of the Housing Authority in connection with all policy and administrative matters prior to any determination made by him, the executive director. At the time the resolution was proposed and adopted, Holtzendorff requested to be relieved of duty in order to take appropriate legal action on the ground that this resolution was a violation of defendant's by-laws, a breach of his contract and one under which he could not operate. After an executive session Holtzendorff withdrew this request.

Pursuant to this same resolution, an audit of defendant's operation reserve fund five was authorized. This audit was made by James Corcoran, a C.P.A., and submitted to the Housing Authority on October 12, 1962. Certain items of this audit became a source of acute controversy between the chairman of the Authority and Holtzendorff.

On December 4, 1962, plaintiffs filed separate actions against the Housing Authority to determine their rights under their employment contracts. These actions were superseded by this litigation.

On March 21, 1963, the Governmental Efficiency Committee of the Los Angeles City Council held hearings with respect to the operation of the Housing Authority, the activities of Holtzendorff and the purposes for which certain funds, particularly from operation reserve fund five, had been expended. The Authority's chairman, in response to a subpoena, presented a statement to the Council committee touching a number of these matters. On March 25, Holtzendorff read a statement dealing, inter alia, with the matters referred to in the chairman's previous statement before the committee and explaining the reason and authority for certain expenditures that had been made out of fund five and which had been criticized by the chairman of the Authority.

On the day following Holtzendorff's appearance before the City Council Committee, the Housing Authority held a meeting during which a resolution was adopted terminating Holtzendorff's employment contract. The commission then took up Miss Rosien's situation and voted to suspend rather than discharge her. She made inquiry and was told the suspension was without pay whereupon she declared that in the circumstances she considered it a dismissal. Later at this same meeting the position for which Miss Rosien had been employed was abolished.

In addition to their general verdicts, the jury was requested to return special verdicts by answering the following interrogatories: "Was plaintiff Holtzendorff discharged by the defendant Housing Authority of the City of Los Angeles on March 26, 1963, for just or lawful cause? (Answer yes or no) *No.*" The jury was

asked to answer a like interrogatory with respect to the discharge of Miss Rosien and gave the same answer.

We first examine the contention of the Housing Authority that the contracts of employment are void on the ground that they cover a period that extends beyond the term of any of the members of the commission. Examination of the Health and Safety Code provisions relating to Housing Authorities reveals that defendant has express and specific power to employ a secretary and executive director and to fix the qualifications, duties, terms of employment and compensation therefor. Section 34278 provides that: "An authority shall select from among its commissioners a vice chairman. It also may employ a secretary, who shall be executive director, . . . and such other officers, agents, and employees as it requires, and shall determine their qualifications, duties, terms of employment and compensation." The Authority is also expressly given the power to "make and execute contracts" (Health & Saf. Code § 34311) and to "contract for the furnishing by any person . . . of services . . . for, or in connection with, a housing project or its occupants." (Health & Saf. Code § 34314.) This grant of power to "determine . . . terms of employment," without any statutory limitations of the power, necessarily confers a wide discretion on the Housing Authority to fix the specific provisions of such an agreement. Since the statute does not proscribe the tenure, duties or compensation of the secretary of a housing authority these incidents of the employment must, therefore, obviously be left for determination in the employment contract. For, as was held in *Main v. Claremont Unified School*

Dist., 161 Cal.App.2d 189, the word "employ" implies the making of a contract. Furthermore, "an employment is, as a rule, based upon a contract with the employee, defining his duties, fixing his compensation and determining the period of his employment." (*Leymel v. Johnson*, 105 Cal.App. 694, 701; *Foucht v. Hirni*, 57 Cal.App. 685, 691.)

The discretion conferred by section 34278 upon the defendant is clearly broad enough to include the hiring of employees for a fixed term rather than at will. In fact, the legislative history of section 34278 indicates that it was the purpose of the section to authorize hiring for a fixed term rather than only for a period at will.

The section was added to the code in 1951. At that time it authorized the housing authority to employ a secretary and such other permanent or temporary employees as were required and to "determine their qualifications, duties and compensation." It will be observed that there was no reference in the section as it then existed relative to "terms of employment." It will be observed, however, that there was a distinction noted between permanent and temporary employees from which it was at least inferable that some kind of fixed tenure or term of employment was contemplated, but any such inference was dispelled in 1953 by an amendment that deleted the reference to permanent and temporary employees and added a provision that the secretary should "serve at the pleasure of the commission." Thus, it was made clear that the secretary could not be employed for a fixed term but only for a period at the will or pleasure of the commission.

In 1957, however, and before the contracts here involved were executed, section 34278[4] was amended to its present form. This amendment deleted the provision that the secretary should serve at the pleasure of the commission and added the provision that the commission had the power to determine the "terms of employment" of its secretary and other employees. The purposes of this change is apparent from its language and from its contrast to the section as it had read immediately before the change. That purpose was to enable the authority to fix the terms of employment so as to give all of its employees, including the secretary, a fixed term if it so desired. Had the Legislature wanted to put a limit on the term for which the employment contract could be made it would no doubt have done so as it did in 1953. The failure to make such a provision in 1957 implies the absence of any such limit as that urged by defendant. In an analogous context, namely, an attack upon a public contract because it extended beyond the terms of office of the contracting board, the Supreme Court observed that if 'the legislature desired to restrict municipalities in this particular, it could easily do so by the passage of a law. . . ." (*McBean v. City of Fresno,* 122 Cal. 159, 169; *King City Union H.S. Dist. v. Waibel,* 2 Cal. App.2d 65, 69.)

It follows that, since the Authority has the power to enter into employment contracts, such contracts are binding upon and enforceable against the Authority.

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[4]Health and Safety Code sections 34275 and 34280 on which the Authority relies do not undertake to put any limits, restrictions, or conditions on the "terms of employment" that the Authority, acting under the power conferred by section 34278, may fix.

Contracts entered into by the state or one of its agencies or subdivisions are governed by the ordinary law of contracts and the public body is bound "in like manner as an individual." (*Souza & McCue Constr. v. Superior Court*, 57 Cal.2d 508, 510; *Western Title Guar. Co. v. Sacramento & San Joaquin Drainage Dist.*, 235 Cal.App.2d 815, 820.)

The "law is settled in California that a contract made by the council or other governing body of [a public agency] . . . is neither void nor voidable merely because some of its executory features may extend beyond the terms of office of the members of such body . . . a contract is binding upon the [public agency] and may not be summarily canceled by a successor council. . . ." (*Denio v. City of Huntington Beach*, 22 Cal.2d 580, 590.) This case held valid a contract where a city employed a lawyer for a term extending beyond that of the council that authorized the contract. In *Cope v. County of Sutter*, 206 Cal. 445, the court held valid a contract by county employing an architect for a term beyond the term of office of the board of supervisors that approved the contract. In *McBean v. Fresno, supra*, at 169, the court upheld a contract by which plaintiff agreed to take care and dispose of the city sewage for five years. The court observed that "there is in this state no inhibition against the making of a contract by a municipal board which shall extend . . . beyond the term of the office of the board which makes it."

It is significant in relation to the permissible length of term that the only restrictions on that length is a general law that an employment contract is not enforceable against the *employee* beyond seven years from the

beginning of service under it. (Lab. Code § 2855.) There is no limit on its enforceability against the employer. The term of the contracts involved at bench was less than seven years. Defendant places great emphasis upon the Pennsylvania case, *Mitchell v. Chester Housing Authority,* 389 Pa. 314, 132 A.2d 873, in support of its contention that a contract may not extend beyond the terms of the board that approved it. That case, however, is readily distinguishable. There was no express or other authorization in Pennsylvania, as there is in California, for a housing authority to enter into employment contracts and to determine the qualifications, duties, compensation and terms of employment. The relevant statute there provided only that the "Authority may employ a secretary . . . other officers, agents and employees . . . and may determine the qualifications of such persons . . ." and the by-laws of the authority provided that the "Secretary shall hold office for an indefinite term at the pleasure of the Authority." (See 132 A.2d at 874.) It is thus apparent that *Mitchell* is not applicable to the case at bench.

The Housing Authority also argues that the employment contracts are invalid because of the delegation of non-delegable public duties. The answer to this argument is found in (1) the language of the contracts and (2) the finding of the court with respect to the character of the duties assigned to plaintiffs and the responsibilities retained by the commissioners.

Section 1 of the employment contracts, provided in pertinent part, that "it is mutually agreed and understood that the powers, duties and functions of Employee shall be *administrative only* and at all times shall be in accordance with the By-laws and Manual of

Policy and Procedure as established or changed by the Commissioners of the Authority from time to time." (Emphasis added.) Section 1 of the contract further provides that "it is specifically understood and agreed that Employee has not and will not be delegated or authorized to exercise any policy making responsibility or authority of any kind, including, but not limited to, the police powers of the Authority. It is clearly understood that all such powers are reserved to the Commissioners of Authority in office from time to time and shall only be exercised by them."

The manner in which these contracts operated with respect to the duties assigned to the employee and those reserved to the Authority is determined in the court's finding: viz, that the employment contracts delegated or assigned to plaintiffs duties that were "administrative only, the performance of which was at all times subject to the control, direction and supervision of the governing body, *i.e.*, the Commissioners of the defendant Housing Authority." And that "All of the duties, powers, functions and authority of the Commissioners were reserved to and retained by them at all times material herein." Further, the commissioners' power to "Make, amend, and repeal by-laws and regulations" (Health & Saf. Code § 34311(e)) or otherwise to function as the Authority's governing body (Health & Saf. Code § 34275) was not sought to be and was not in fact limited. It is thus apparent that the employment contracts did not assign to plaintiffs any nondelegable duties either under the express terms thereof or under their interpretation.

Defendant bases its argument re the unlawful delegation of its public duties, in part, on these provisions

of the employment contract. (a) In section 1, the contract states: "[I]t is mutually understood and agreed that the nature and scope of said administrative duties will neither be increased nor decreased during the period of this Agreement without the written consent of Employee," and (b) section 2 provides that "Section 6 of the By-laws of the Authority [which defines the duties of the secretary] is not to be interpreted contrary to Sections 1 and 2 of this Agreement." This argument is irrelevant, for even assuming it is sound as to the invalidity of those provisions, this does not affect the judgment. Holtzendorff did not seek enforcement of these provisions; the judgment neither enforces them nor depends in any way on their validity. These provisions are severable[5] from the provisions that were enforced at bench and do not affect the validity of the other provisions.

We shall now consider the special verdicts of the jury that the discharges of plaintiffs were without good cause. To terminate an employment without the expiration of its contractual term "there must be good cause." The grounds for terminating such an employment are stated in Labor Code section 2924. That section provides: "An employment for a specified term may be terminated at any time by the employer in case of any wilful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it." It is therefore not every deviation of the employee from the standard of performance sought by his employer that will justify a discharge. There must be

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[5]Each contract has a severable provision in the event any part of it is declared invalid.

some "wilful act or wilful misconduct . . ." when the employee uses his best efforts to serve the interests of his employer. (*Goudal v. C. B. DeMille Pictures Corp.*, 118 Cal.App. 407, 413.)

Three grounds are urged in the briefs to justify the discharge of plaintiffs.[6] The first of these is the payment by Holtzendorff of some $5,500 from the operation reserve fund five to Miss Rosien to cover accumulated vacation and sick leave pay.

Under her contract part of Miss Rosien's compensation was "the same vacation, sick leave . . . and retirement benefits now granted, or during the term of employment . . . is granted, to other employees of the Authority." It is established that at all times here material the Authority maintained a plan or policy for vacation and sick leave benefits, approved and adopted by the commissioners of the Authority. The amended complaint alleged in detail the specific provisions of that plan, namely the accumulation of ten hours of vacation time and four hours of ick leave time for each calendar month of service in the preceding twelve months and the payment, if not taken, of a sum computed by multiplying the accumulated time by specified fractions of the employee's annual compensation. The correctness of this formula was not challenged.

On February 20, 1962, the governing board of the Authority adopted a resolution authorizing the payment to Miss Rosien of $5,515.87 in full discharge of the Authority's obligation to her for earned and accumulated leave time. The leave time earned was accumulated

[6]At oral argument counsel for the Authority conceded that sufficient showing had not been made to establish "good cause" for the discharge of Miss Rosien.

to her credit just as it was for other employees so situated; and it would appear that the Authority was obligated to pay her the cash value according to the established formula for such accumulated time. At the end of each year the governing board authorized each such employee, including Miss Rosien, to carry over the accumulated time, resolutions to that effect being regularly adopted. From these circumstances it would appear that the jury could reasonably find that this incident did not show good cause for the termination of the employment contracts of either of the plaintiffs.

Defendant's reliance upon *Jarvis v. Henderson,* 40 Cal.2d 600, is misplaced. That case held that the salary of a civil service employee, fixed by statute, could not be increased by allowance of overtime pay. Here, no statute fixes salary. The applicable statute impowers the Authority to enter into an employment contract, and fix the employee's "terms of employment and compensation." (Health & Saf. Code § 34278.) Vacation and sick leave benefits were expressly fixed in the employment contract as a part of Miss Rosien's compensation.

The second ground upon which defendant seeks to justify the discharge of Holtzendorff is the fact that he had listening devices installed in the offices of defendant; also in the office of the principal supervisors, the commission room and offices in the financial department. Plaintiffs were able to overhear conversations of persons working in these areas of defendant's offices. According to Miss Rosien these listening devices were installed in the new offices early in 1960. They were purchased from the operation reserve fund. The monitoring system was said to have been installed

mainly for reasons of security against communist infiltration of which it was claimed the Authority had had some experience, and in a lesser degree for determining employee efficiency and for security against the pilfering of cash, considerable amounts of which were handled and counted by defendant's personnel. Because of these security reasons knowledge of the system was not disseminated throughout defendant's personnel. But its existence and use were made known to Mr. Beavers who was then chairman of the Authority. "He said that it was perfectly all right, that we should do everything that we possible could to see to it that the Housing Authority was never again infiltrated" by the communists. Holtzendorff testified the existence of this monitoring system was made known to Chairman Blodgett soon after he became chairman early in July 1962. Blodgett suggested that it be removed. Holtzendorff stated that he promptly followed out this suggestion. Nothing was done thereafter about the monitoring system by the chairman or any other commissioner, according to Holtzendorff.

It is apparent there was evidence from which the jury could have inferred that the monitoring system was installed and operated in a good faith effort to preserve and further the best interests of the Housing Authority. The inference of good faith with respect to the installation and use of this monitoring equipment must be deemed to have been drawn by the jury since it tends to support the verdict.

The jury, taking into account all the facts and circumstances relating to the monitoring incident, reasonably could have determined that it did not justify the discharge of Holtzendorff.

The third ground upon which Holtzendorff's discharge is attempted to be justified was his testimonial statement before the Government Efficiency Committee of the Los Angeles City Council.

The hearing before the City Council committee appears to have grown out of a letter written by Commissioner Vie on March 11, 1963, in which he suggested that certain aspects of the Housing Authority's activities be investigated by the City Council. These related to (1) possible use of city funds for non-city purposes; (2) certain possible misconduct by certain commissioners of this Authority, and (3) certain possible improper influencing by city officials of contracts of this Authority. This letter was referred to the above council committee which set a date for hearing thereon. It issued a subpoena to the chairman of the Authority and to the other commissioners. It also issued a subpoena to Holtzendorff. On March 21, 1963, Mr. Blodgett, the chairman of the Housing Authority, appeared before the council committee and presented a statement in writing. He mentioned, inter alia, that when he and three other newly appointed commissioners appeared before the council committee on county, state and federal affairs prior to their confirmation by the City Council they "were urged by these councilmen to exert every effort to 'clean up the sorry mess which has existed for many years in the [Housing] authority.'" The chairman noted that at the first meeting of the commission it was unanimously agreed to institute an inquiry into the fiscal and management policies of the Housing Authority and the competence of its staff. He went on to say that "Our findings to date have starkly confirmed the council committee's fears that the Housing Authority is indeed a sorry mess." He noted

that "We learned listening devices were concealed in the ventilating ducts of the commission room and the auditors office, as well as other offices throughout the building. These concealed devices were ordered removed immediately by this commission." Also, "Our fiscal inquiries disclosed the existence of an operational reserve fund, also known as fund 5, which was separate from the Public Housing Administration funds and was not subject to audit by the PHA." The chairman pointed out that the commission authorized an audit by a certified public accountant, and that "This audit revealed that fund 5 had been grossly and frequently raided by expenditures the fund was never intended to pay. In effect, the fund had become a cookie jar for outrageous and improper expenditures." He noted, by way of example, that the audit of fund five disclosed that money had been used from it to pay $5,515.87 to Miss Rosien in lieu of vacation time claimed by her to have accrued since 1951; that $2,000 had been paid for law books and reference books purchased by the executive director for his personal use and later sold by him to the Housing Authority; that the amount of $36,000 for legal fees and approximately $10,000 other charges for the representation of the executive director as a result of litigation arising from his indictment by the grand jury, and the amounts of $4,100 each for two automobiles purchased for the executive director and assistant executive director had come from this fund. The chairman then commented that "These are but a few of the items charged to fund 5 that this commission believes improper." He stated, "We have referred several of the above items to our general counsel for review." The chairman further commented, "There are many others we believe to have been

improperly charged to fund 5 . . ." which he enumerated as examples.

He pointed out that "as a result of consistently inaccurate minutes kept by the executive assistant of commission meetings, and for other reasons, the commission was forced to authorize the retention of a certified statement reporter to accurately report verbatim commission meetings." He concluded his statement with this comment. "The investigation is continuing and will continue until we have complied with the City Council committee's original instructions 'to clean the whole mess up.'"[7]

The statements of the chairman were denunciatory and accusatory and undeniably either directly or inferentially referred to Holtzendorff and Miss Rosien (more particularly to the former). Holtzendorff had a right to be heard if he felt any of the statements were untrue, inaccurate, incomplete or unfair. That opportunity was presented by reason of a subpoena served on Holtzendorff to appear before the committee and testify.

At this point it should be noted that the giving of testimony before the committee was not anything done by Holtzendorff "in the course of his employment." It was *testimony* given by him in response to a subpoena before an investigating body having the power to compel testimony. He could not have been prevented or lawfully ordered by his employer not to give it. It was

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[7]These portions of Chairman Blodgett's statement to the committee are set forth as a foundation for considering the element of provocation in Holtzendorff's reply when he appeared before the committee on March 25, 1963. We do not pass upon the truthfulness, accuracy or completeness of the information purportedly contained therein. Those were matters for the jury's consideration.

a matter entirely between the committee and the witness, over which the employer had no control. (Cf. *Petermann v. International Brotherhood of Teamsters,* 214 Cal.App.2d 156, 158.)

It should also be noted that we are concerned here with defendant's reliance upon a precise, statutory ground of discharge—breach of duty in the course of employment. Holtzendorff owed his employer no duty in respect to his testimony. His only duty in that respect was to the law, and his conscience; that is, his duty to respond to the subpoena and to obey the testimonial oath to tell the truth, the whole truth and nothing but the truth. He could not lawfully be controlled in any way by his employer as to the manner in which he fulfilled that oath. (Cf. *Petermann v. International Brotherhood of Teamsters, supra,* at 158.)

The significance of some of the comments of the chairman of the Authority to the City Council committee had a natural tendency to provoke a response from Holtzendorff of an emphathic character. This is a factor that the jury could properly take into account in evaluating Holtzendorff's testimony before the committee. The essential question on this aspect of this controversy is whether Holtzendorff committed a breach of an employee's duty to refrain from what Labatt calls "insolent, offensive, and threatening words and behavior." (Labatt, Master and Servant, 2d Ed., Vol. I, p. 930.) This question is one of fact, to be decided in the light of all the circumstances of the case as to what led up to the testimony before the committee, the extent to which it was provoked by the prior statement to the committee by the chairman of the Authority, and its reasonableness as an exercise of the em-

ployee's right to protest and defend himself against charges that he felt were either untrue, inaccurate or incomplete in their statement. In this connection, Labatt (Vol. I, §299, p. 932) states:

> "As the various kinds of language and behavior which constitute a breach of the duty [to refrain from insolent, offensive and threatening conduct] . . . are described by terms which are not susceptible of any precise legal definition, the question whether, in any given instance, a breach was committed, is essentially one of fact, and therefore primarily for the jury."

We shall now note a few of the statements made by Holtzendorff in his twenty-five pages of testimony before the council committee.

At approximately the outset of Holtzendorff's appearance before the City Council committee he made these comments:

> "Before the first meeting of this Committee convened last Thursday, March 21, 1963, Mr. Julian Blodgett, Chairman of the Authority, released to the press copies of a written statement he intended to read as a witness to this Committee.
>
> "This statement in no way replied to any of the questions raised by Commissioner Vie in his letter to the Council of March 11, 1963. Instead, it contained a series of malicious, false and defamatory statements attacking the Director and Assistant Executive Director of the Housing Authority.
>
> "This attack of course was intentionally calculated to divert this Committee and the public's attention from the matter under investigation, to

wit: Commissioner Vie's" questions in his letter of March 11, 1963.

Holtzendorff then continued:

"While I have no intention of in any way assisting in this diversionary effort, I wish, on the part of both myself and the Assistant Executive Director, Miss Rosien, to state that all expenditures from the Authority's Operation Reserve Fund were approved and authorized by the Commissioners then in office by official Commission action after each of said actions were approved by either the then attorney for the Authority, or in some cases the City Attorney. I also wish to categorically deny for both myself and Miss Rosien any and all inferences, innuendos, or statements that any of the expenditures made from this fund to either of us or on our behalf was in any way irregular or improper."

The witness later testified:

". . . Mr. Blodgett does not agree with his predecessor Commissioners as to some of the expenditures approved and authorized by them. He picks out 7 or 8 old items out of hundreds, characterizes the fund as a 'Cookie Jar for outrageous and improper expenditures,' and after viewing them with alarm through a gigantic magnifying glass, concluded that the Housing Authority is a 'sorry mess.'"

The witness handed the chairman of the committee a copy of the audit report filed by Mr. Corcoran, C.P.A. with the Authority on October 12, 1962, attached to which was an opinion by E. H. Delorey, Es-

quire, counsel for the Authority, which read in part as follows:

> "Certain questions were raised by the examiners in connection with the conduct of the Authority in connection with the Operation Reserve Fund, each of which questions were answered by the report in its exhibits by virtue of the fact that each item to which reference is made in the body of the report appears to have been authenticated and approved by either action on the part of Legal Counsel for the then acting Commission or the opinion from the City Attorney's office itself.
>
> "It therefore seems inappropriate, if not futile, at this time to reevaluate prior opinions for the conduct authorized by them."

The witness also handed the committee a copy of the Authority's independent contract auditor's reports of the Authority's operation reserve fund from the date of its establishment in 1954 to date. In addition the witness furnished the committee with the reporter's verbatim transcript of the commission meeting of January 24, 1963, at which time the commission gave final consideration to and ordered the Corcoran audit report of October 12, 1962, accepted and filed. Pages 65 and 66 of said transcript reads, in part, as follows:

> "'The Chairman: Are there any comments from the Commission? If there are no comments from the other members of the Commission, I would like to say just one thing before we accept and file the original copy of the report and the opinion of our Legal Counsel. That is this: that as a new member of this Commission, appointed effective

July 2, 1962, I as well as others of the new appointees, new Commissioners, were recipients of rumors, allegations of one sort or another, concerning the operation and management of the Operation Reserve Fund of the Los Angeles Public Housing Authority.

"'As a result, at the meeting of July 10 of the past year, this Commission adopted a Resolution authorizing the audit and review of the Operation Reserve Fund by an outside, unbiased source so that these rumors, these allegations, could either be dispelled entirely, once and for all, or if there was any substance to them, that this new Commission, the 4 new members, I should say, would be in a position of having the unbiased review and research.

"'Now, you have all heard Mr. Delorey's opinion. You have all had the opportunity of reviewing Mr. Corcoran's report and certainly there was nothing which would lend substance to any of the rumors or allegations of any management or activities which was of an illegal nature.

"'In addition, as Mr. Holtzendorff has said, this inquiry and report summarizes, brings up to date, all of the major expenditures from the Operation Reserve Fund, and as far as I am concerned, has certainly dispelled any allegations of anything of an illegal nature, insofar as the expenditures were concerned, and I think and I affirmatively believe that it is [to] the benefit of us new members of this Commission to have this report as a guide to us in our tenure as members of this Commission.

"'. . . If there is no further comment, the Special Report of the Los Angeles Housing Authority Operation Reserve Fund, dated October 12, 1962, and the exhibit will be accepted and filed.'"

The witness commented: "Thus, the documented record I have just read clearly and irreputable [*sic*] puts the lie to any and all remarks of Mr. Blodgett or anyone else, who now tries to use the Corcoran Operation Reserve Fund Special Audit Report as the basis to libel and slander of [*sic*] the Executive Director or the Assistant Executive Director."

The witness mentions, "Mr. Blodgett specifically criticized the alleged 'inaccurate minutes kept by the Executive Assistant of Commission meetings' and that this was the reason why a Certified Statement Reporter had been employed to report verbatim Commission meetings." The witness then commented: "Like all his other accusations—the record clearly indicates that this is not true." With respect to the removal of the monitoring system or listening devices, Holtzendorff had this to say: "Mr. Blodgett's statement also over-emphasizes and incorrectly states that, 'We (the Commission) learned and ordered the removal of listening devices from the Central Office building of the Authority.' This statement is not true."

With respect to the chairman's remarks about the payment of $2,000 to Holtzendorff for his law books he has this to say: "Finally, I wish to point out that Mr. Blodgett's remarks that $2,000 was paid from the Operation Reserve Fund to me for the purchase of my law books is wholly false. These books were not paid for from this fund. They were paid for from the regu-

lar fund of the Authority and said payment was duly authorized by the Commission and approved by the Public Housing Administration." The witness handed the committee a copy of a resolution authorizing said purchase together with a copy of a letter from the Public Housing Administration approving same.

The question with respect to Holtzendorff's statement therefore is—did it go beyond the bounds of the provocation that produced it? To put the matter another way, was his statement so insolent, disrespectful and offensive as to justify his discharge? Whether it was of that character was a question for the jury. Furthermore, in determining whether it was of that tenor the provocation that gave rise to it cannot be ignored. The whole point of the provocation rule is that conduct which, if unprovoked, might be cause for discharge may not constitute such cause when the employer has provoked it. Implicit in the jury's special verdict that there was not good cause for the discharge of Holtzendorff is the implied finding that his testimonial statement before the committee did not go beyond the bounds of the provocation that produced it. In the circumstances we cannot say as a matter of law that the jury was not justified in the rendition of its special verdict.

Defendant argues that the contracts of plaintiffs were invalid because they were not limited to a term not exceding four years. The Authority basis this contention on section 16, article XX, of the State Constitution.[8]

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[8]So far as material here those provisions are: "When the term of any officer or commissioner is not provided for in

(This footnote is continued on the next page)

The trial court, however, found that:

> "Neither of the plaintiffs was at any time an officer or commissioner of the State of California or of any political subdivision thereof. Neither of the plaintiffs had or exercised, as part of his or her employment by the defendant Housing Authority, any sovereign power of the State of California or of any political subdivision thereof. Neither the Holtzendorff nor Rosien Employment Contract was required to be, nor was either of said contracts invalid because it was not, limited to a term not exceeding four years. The defendant Authority is a body corporate and politic and each of the plaintiffs is an officer thereof."

It will be observed that this constitutional provision by its express terms applies only to an "officer or commissioner" not to an employee. This is a self-evident proposition. In *Stewart v. Eaves,* 84 Cal.App. 312, the court held, upon facts closely similar to those at bench, that a school superintendent was not an officer but only an employee within the meaning of a constitutional provision prohibiting an increase in the compensation or an extension of the term of an officer "after he had been appointed." Whatever sovereign or governmental powers are given to a housing authority are expressly given not to an individual or officer but to the "authority." (Health & Saf. Code §§ 34310, 34312, 34315, 34317, 34318, 34319, 34325, 34351.) The func-

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this Constitution, the term of such officer or commissioner may be declared by law; and, if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years; . . ."

tions of the Authority are vested in its commissioners (Health & Saf. Code §§ 34270, 34275), upon whose vote "[A]ction may be taken by the authority." (Health & Saf. Code § 34276.) None of those powers could be exercised by plaintiffs. The situation at bench is therefore analogous to that in *Main v. Claremont Unified School Dist.*, 161 Cal.App.2d 189, where the court held (p. 204) that a school superintendent was an employee rather than an officer. This conclusion was impelled by the fact that in "no real sense does the superintendent exercise independent powers. Always he operates under control of the board and hence exercises none of the sovereignty of the state," citing *Stewart v. Eaves, supra,* and numerous other authorities. In like manner, plaintiffs at bench always operated under the control of the Authority and hence exercised none of the sovereignty of the state.

It should not be overlooked that the enabling statute *employ* a secretary. . . ." (Health & Saf. Code §34278; emphasis added.) This is indicative of employee rather than officer status. Similar significance was given to the statutory language in *Main* where the court noted that the enabling statute provided that the school district "may *employ*" (court's emphasis) a superintendent.

The net result of the factual picture is that the trial court reasonably could draw inferences that plaintiffs were employees, not officers or commissioners. They operated under control of the Authority, hence, they exercised none of the sovereignty of the state. (*Main v. Claremont Unified School Dist., supra,* 161 Cal.App. 2d 189, 204.) It is tenure or term of office, not term or duration of employment with which section 16 deals.

The challenged finding, quoted above, has adequate evidentiary support, and the constitutional provision on which defendant relies has no application to plaintiffs' contracts.

Defendant refers to and quotes at length various provisions of the Authority's by-laws and Manual of Policy and Procedure, in an effort to show that plaintiffs were vested with a part of the state's sovereignty. Defendant neglects, however, to refer to those portions of the employment contracts that provide "that the powers, duties and functions of Employee shall be *administrative only,* and at all times in accordance with the By-laws and Manual of Policy and Procedure as established or changed by the Commissioners of the Authority." (Emphasis added.) In this connection defendant also fails to mention that the powers or duties given to the secretary were given him by the Authority's by-laws and Manual of Policy and Procedure which were adopted and maintained by its governing board, the commissioners; and that those powers and duties were expressly made subject to the direction, control and supervision of the governing board. Defendant also failed to mention that so far as those duties dealt with matters of policy, the secretary's power was only to make recommendations to the commissioners. They, not the secretary, made the determination whether to put any particular recommendation into effect. Finally, section 6 of Article II of the Authority's by-laws provides that "the Executive Director . . . shall be charged with development and management of its housing facilities, and shall perform all duties of his office, *subject to the direction of the Commissioners of the Authority.*" (Emphasis added.) It is thus apparent that under

defendant's own organizational set-up plaintiffs exercised "none of the sovereignty of the state."

The fact that plaintiffs may have been officers of the Authority does not bring them within the purview of section 16 for they were found upon substantial evidence not to be officers of the state for they neither had nor exercised any of the sovereign power of the state or of any political subdivision thereof within the meaning of said section. Whatever may be the correct characterization to apply to the positions held by plaintiffs with the Authority, it is indisputable that they held it by reason of a contract defining their duties, fixing their compensation and determining the period of their employment. One so employed is not an officer of the state; he is the employee of the person or organization employing him, although the person may be a public officer and the organization may be engaged in public work.

There is no merit in the Authority's argument that the federal Public Housing Administration (PHA) is an indispensable party to this action. The argument ignores one decisive fact—the subject matter of the action, which is the Authority's breach of a contract to which PHA was not a party and in which it had no justiciable interest of any kind. By definition an indispensable party is one whose "absence will prevent the court from rendering an effective judgment *between the parties* or would seriously prejudice any party *before the court*," or whose interest "would be inequitably affected or jeopardized by a judgment rendered *between the parties*." (Code Civ. Proc., § 389; emphasis added.) PHA fits none of these three categories.

A judgment awarding the plaintiffs damages for the Authority's breach of its contract with them could and was effectively rendered without PHA's presence. There was no prejudice to any party before the court. The plaintiffs were not prejudiced by PHA's absence, and, of course, they are not complaining of its non-joinder. Neither was the Authority prejudiced. It was not prevented by PHA's absence from availing itself of any and all evidence, arguments and defenses it desired to present. Nor has PHA any interest at all, let alone one that would be jeopardized by a judgment between the parties." No support for joinder of PHA therefore can be found in the indispensable party provisions of section 389, Code of Civil Procedure.

Peabody Seating Co. v. Superior Court, 202 Cal. App. 2d 537, strongly supports the trial court's decision on this matter. In that case it was held that one who was not a party to the contract in suit was not an indispensable party, even though a contract it had with one of the parties to the action would be consequentially affected by a judgment adverse to its contractor. The interest, the court held, was only "consequential and economic" and therefore not the "legal interest" necessary to make one an indispensable party.

Defendant argues, however, that even if PHA was not an indispensable party it was nevertheless a conditionally necessary party under section 389, Code of Civil Procedure as amended in 1957. A "conditionally necessary party" is one who is not indispensable but whose joinder "would enable the court to determine *additional causes of action* arising out of the transaction or occurrence involved in the action." (Code Civ. Proc., § 389; emphasis added.) The Authority fails to point

out what "additional causes of action arising out of the transaction or occurrence involved" would be presented for determination if PHA were made a party. The "transaction or occurrence involved in the action" is the discharge of plaintiffs by the Authority from their employment contracts. No fact or circumstance is shown giving rise to any cause of action for or against PHA arising out of that transaction or occurrence. Furthermore, there is no showing of any prejudice to the defendant by the absence of PHA. The moving papers make no such showing.

The fact that PHA is in possession of and is operating the Authority's housing projects gives it no justiciable interest in this case. The contracts which formed the subject matter of this action were made with the *Authority,* a separate and distinct entity or legal person. That entity or person remains, and is the same as it was when the contracts were entered into, regardless of what changes there may be in its executive, administrative, governing board or personnel.

The Authority vainly argues that its supplementary retirement plan is invalid and that its inclusion in the contracts render them invalid on the theory that it constitutes a gift of public funds in violation of sections 31 and 32, article IV of the State Constitution. The trial court made a comprehensive finding on this problem which reads:

> "At the time the Holtzendorff and Rosien Employment Contracts were entered into the defendant Housing Authority maintained and continued thereafter to maintain a retirement plan for its employees under and by virtue of which it was granting, and at all times thereafter continued to

grant, to other of its employees retirement benefits (consisting of so-called 'basic' and 'supplementary' benefits) under and by virtue of which such employees could retire after a specific period of continuous service upon attaining age 55; upon and after which retirement the defendant Housing Authority would pay or cause to be paid to such retired employee for the remainder of such employee's life a fixed monthly sum computed in proportion to the employee's term of service at a rate that had been and was fixed and determined by the defendant Housing Authority. Said retirement plan entered into and became a part of the Holtzendorff Employment Contract and also of the Rosien Employment Contract. Said retirement plan was adopted by defendant Housing Authority before those employment contracts were entered into; and it superseded a substantially similar plan that had been adopted by the defendant Housing Authority several years before and that had been continuously maintained by said defendant until superseded. Each of the plaintiffs was at all times a participant in each of the retirement plans adopted and maintained by the defendant Housing Authority. One of the conditions of said supplementary retirement plan was and is that, with the exception of vesting at normal retirement date or death, no account (benefits) thereunder should vest unless the participant, upon termination of employment executed an agreement with the defendant Authority that he or she will act when called upon by the Authority, for a period of five years as an independent consultant to and for the

Authority. The retirement plan adopted and maintained by the defendant Housing Authority (including both basic and supplementary retirement benefits) was adopted and maintained in aid of a public purpose and, as applied to the plaintiffs and included in their respective employment contracts, was supported by a valuable consideration. Said plan was not a gift of public funds or property and was not an attempt to make such a gift."

It will be recalled that the compensation to be paid plaintiffs was the same retirement benefits as were granted to other employees. A retirement plan, including the supplementary benefits, was maintained for other employees at the time the employment contracts with plaintiffs were executed and at all times thereafter. At the time the supplementary plan was adopted, plaintiffs had pensionable status since they were and continuously had been participants in each of the retirement plans maintained by the Authority. And they were qualified to participate and did participate in all of the pension funds which were in effect during their employment. As a consideration of receiving the supplementary benefits an agreement was required that the employee would render services when called upon for a period of five years as a consultant to the Authority. The allowance of supplementary benefits was, therefore, not based on past services but upon future services to be rendered after the supplementary plan was adopted. It is settled in California that a pension or retirement plan for public employees is not a gratuity or gift. "[P]ension provisions do not provide for a gratuity but 'become a part of the contemplated compensation for those services and so in a sense become a part of the

contract of employment itself . . . the right to a pension becomes a vested one upon acceptance of employment by an applicant.' . . ." (*Brophy v. Employees Retirement System,* 71 Cal.App.2d 455, 458; *Kern v. City of Long Beach,* 29 Cal.2d 848, 855; *Dryden v. Board of Pension Commrs.,* 6 Cal.2d 575, 579.) "A pension is a gratuity only where it is granted for services previously rendered which at the time they were rendered gave rise to no legal obligation." (*O'Dea v. Cook,* 176 Cal. 659, 661, quoted with approval in *Sweesy v. L.A. etc. Retirement Bd.,* 17 Cal.2d 356, 359, 360, and *Riggs v. District Retirement Board,* 21 Cal.2d 382, 385.) The converse of this proposition is, of course, that if the services did give rise to a legal obligation at the time they were rendered a later pension increase in an existing pension will not be held a gift. Thus, persons having a pensionable status are entitled to receive any increase of benefits which may be provided. (*Sweesy v. L.A. etc. Retirement Board, supra.*)

At the time the supplementary plan became effective a retirement system was in operation. The supplementary plan added to and increased the benefits of the existing system. Plaintiffs had pensionable status under that system. They were employees when the supplementary plan went into effect and it became a part of their contracts of employment and as such a part of their conpensation for services thereafter to be rendered. So, they were entitled to any increase in benefits that might be put into effect. That increase is not a gift. The case clearly comes within the doctrine of the *Sweesy* case. It is thus clear that the supplementary retirement plan does not violate the constitutional provisions which prohibit the gift of public funds, and its

inclusion in the contracts does not render them invalid.

The Authority argues that the rescission of the employment contracts between it and plaintiffs, and the execution of the new contracts here under review at an increased salary amounted to a gift of public funds in violation of sections 31 and 32 of article IV of our Constitution. The court, however, found against defendant on this aspect of the case. The court found that the Holtzendorff contract recited that he had continuously and satisfactorily served the Authority since February 1941 under written agreements for various fixed periods, and that in order to assure the Authority of his continued services and in order to protect the Authority's investment in his long and valuable training and experience, it was determined to be necessary and in the best interest of the Authority to assure itself of the continued services of Holtzendorff by entering into another written agreement for a further fixed period. A similar finding was made with respect to Miss Rosien. The court further found that the contracts of plaintiffs recited that both the Authority and the employee agreed that the existing contracts should be rescinded and new employment contracts entered into.

The court also found:

> "Each of those contracts was supported by a valuable consideration moving respectively from each of the parties thereto to the other."

Finally, the court found on this point:

> "The Holtzendorff and Rosien Employment Contracts were, and each of them was, entered into in aid of a public purpose, and there was a valuable consideration for each of the contracts and

for the promise and agreement of the defendant Housing Authority to pay the compensation provided for in and by said contract. Neither of the contracts, nor any of the compensation promised and agreed to be paid or given under them, was or constituted or provided for any gift of public funds or property."

In this connection it should be noted that, as between the contracting parties, the recitals in the contracts are conclusively presumed to be true. (Code Civ. Proc., § 1962, subdv. 2; *Bowyer v. Burgess,* 54 Cal.2d 97, 100.) Also, there was testimony that Holtzendorff had expressed to Mr. Beavers, then chairman of the Authority, a feeling of discouragement because of his indictment (of which he was acquitted); that his family was urging him to move; and that he was thinking of returning to his native state, Nebraska, where he was admitted to the Bar, and practice law. In response Mr. Beavers suggested, instead, new contracts that would assure the Authority of his and Miss Rosien's services, and also would carry them through to the time when they would be eligible to retire. As a result the new contracts were prepared and executed. It is reasonable that the chairman and other commissioners should look upon the retention of the services of plaintiffs for a substantial additional period as a benefit to the housing project because of their years in carrying out the administrative programs of the Authority. The experience they had gained was invaluable and it would, no doubt, have been difficult (maybe impossible) to replace them with adequately trained personnel. The Authority was therefore justified in extending the terms of their employment and increasing their

compensation. Thus, the contracts were "entered into in aid of a public purpose," as the court found, and were "supported by a valuable consideration," as the court also found. And there was no gift of public funds in violation of article IV, sections 31 and 32 involved in the rescission of the former contracts and the execution of the new. In this factual context, it is apparent that defendant's reliance on *California Highway Comm. v. Riley,* 192 Cal. 97 is misplaced.

Defendant misconceives the provision of the employment contracts relative to its obligation to furnish each of the plaintiffs with an automobile. Counsel apparently reads the provision as though it dealt with the use of a publicly owned vehicle for personal or private purposes. The court, however, set this matter at rest for it found: "The use of a passenger automobile by each of the plaintiffs was intended and agreed to be a use in connection with the work and business of defendant, Housing Authority, and according neither plaintiff is entitled to recover for the loss of such use."

In any event, the contractual provision is severable from the other compensation provisions, and no recovery on account of it was allowed. Thus, it does not affect the validity of those provisions of the contract that were enforced.

Defendant complains that the court erred in giving instruction number seven which reads:

> "You are instructed that the defendant in this case being a public corporation can act only through its governing body, that is, its commissioners. You are further instructed that any knowledge or information had or acquired by any one or more of its commissioners during and in the course and

scope of his office as such commissioner, is in law deemed to be information or knowledge had by the defendant. Accordingly, the defendant could not properly or lawfully discharge the plaintiffs, or either of them, on account of any matter or thing known to the defendant at the time the defendant entered into the employment contract with the plaintiff concerned in such matter or thing."

There can be no question about the correctness of the first sentence of this instruction. (Health & Saf. Code § 34275.)

As to the remaining portion of the instruction it should be noted that it is not relevant to either the payment to Miss Rosien for her unused vacation ad sick leave, nor to Holtzendorff's testimony before the City Council committee, since both of these events occurred *after* the execution of the employment contracts here in question. Furthermore, the Rosien transaction was authorized by a resolution adopted by the governing board.

This leaves the installation and operation of the monitoring system as the only incident to which the instruction is relevant. In the context of that incident the instruction appears to be entirely in order. It simply states, in effect, that knowledge acquired by one of the commissioners "during and in the course and scope of his office as such commissioner, is in law deemed to be" the knowledge of the Authority. The reason a commissioner's knowledge is imputed to the governing board is that it is his duty to communicate to it any information he possesses that is material to the operation and protection of the business in which it is en-

gaged. It is, therefore, fair to assume that he has done so (*McKenney v. Ellsworth,* 165 Cal. 326, 329; *Thompson v. Williams,* 190 Cal.App.2d 56, 60), provided there is no fraud or conflict of interest, and there is not anything suggested in the instant case which would have deterred chairman Beavers from advising the other board members that Holtzendorff had installed a monitoring system and the reasons therefor. Here we have a public corporation with five directors or commissioners operating a low rent housing venture. There is no reason why the rationale of imputed knowledge should not be just as applicable to the commissioners which run this public corporation as to the directors of a private corporation which is engaged in operating a housing project. Although defendant disputes this proposition, it cites no cases in support of its position.

In this connection, it should be pointed out that the question is not one of *binding* the principal by the knowledge of the agent who has no authority to act in the premises. Here the commissioner is, inter alia, a conduit for the transmission to the governing board of information acquired in the course and scope of his position and which is germane to the common responsibility of all the commissioners. It is a reasonable assumption that he will, as he should, communicate the information so acquired to the entire board. This is true even though he may be without authority to act individually or to bind the governing board in respect to the subject matter. Whatever binding effect is brought about results from the *board's action,* which must be considered to have been taken with the imputed knowledge of the facts learned by its member.

Thus, the information acquired by chairman Beavers from Holtzendorff that a monitoring system had been installed was imputed to the board (and it is likely, in view of its significance in the operation of the business, to have been conveyed to the full membership of the board by the chairman) so that when the board executed Holtzendorff's new contract of employment on April 19, 1961, it knew about and approved his action in installing this equipment. Hence, he could not be discharged for what he had done in this respect prior to the execution of the latest contract. Thus, the instruction was proper.

Defendant has raised some additional points but they are not of sufficient significance to justify further extending the opinion on this appeal for they could not possibly affect the outcome of the judgment.

The judgment in favor of plaintiffs must be affirmed.

Holtzendorff's Cross-Appeal

By its cross-complaint the Housing Authority seeks to recover money paid to Holtzendorff to reimburse him for funds expended by him for attorneys' fees and expenses in his defense in the criminal case of *People v. Holtzendorff*. From a judgment in favor of the Housing Authority in the amount of $38,442.61,[9] Holtzendorff has appealed.

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[9]The judgment is made up of two items: (1) $36,537.17, the amount of reimbursement paid out to Holtzendorff by the Housing Authority and (2) interest thereon at seven percent from May 11, 1964, the date of demand, to the date of the entry of judgment.

In the interest of accuracy and completeness we quote the essential findings of fact and conclusions of law:[10]

The Findings:

On December 4, 1957, Holtzendorff was indicted by the Grand Jury on 21 counts of embezzlement of public moneys in violation of Section 424, subdivision 2 of the Penal Code, and 21 counts for the same felony in violation of Section 504 of said Code, and for 10 counts for falsification of public records in violation of Section 424, subdivision 3 of said Code. All of said counts arose out of alleged orders and directions given by Holtzendorff to subordinates to use property and services of employees of the Housing Authority and the alleged use of such property and service pursuant to said orders and directions during the period from February 20, 1953, to March 31, 1953, in support of Mayor Bowron's campaign for reelection as Mayor of the City of Los Angeles. Holtzendorff made a motion under Section 995 of the Penal Code to set aside the indictment, which was granted. Appeal was taken and the District Court of Appeal in the case of *People v. Holtzendorff,* 177 Cal.App.2d 788, on February 15, 1960, reversed the order as to all counts charging a violation of said Section 504 and affirmed

[10]During the course of the main trial the parties stipulated that the court, sitting without a jury, should determine the issues raised by the cross-complaint and the answer thereto, upon the evidence admitted at the main trial and upon the pleadings and evidence admitted in the case of People v. Holtzendorff, No. SC 197276, in the superior court. The parties later stipulated that the court could also consider the employment contract of Holtzendorff dated December 2, 1949.

as to all other counts. On November 14, 1960, the defendant was found not guilty on the counts charging a violation of said Section 504.

"III. On November 29, 1960, Holtzendorff presented to the Commissioners of the Housing Authority a claim for reimbursement of legal fees and expenses incurred by him during the period from December 4, 1957, through November 14, 1960, in connection with his defense in the case of *People v. Holtzendorff,* in the amount of $36,-537.17. Said claim was verified by Holtzendorff in which he certified that the 'Defense of the above action (referring to the criminal action of *People v. Holtzendorff*), arose directly from activities alleged to have been committed by the Executive Director in the Administration of the affairs of the Housing Authority of the City of Los Angeles, California.' At an adjourned regular meeting of the Commissioners on said date, said claim was approved as submitted and payment was authorized. On November 30, 1960, the Housing Authority paid Holtzendorff the amount of said claim.

"IV. On January 29, 1959, the chairman of the Commission requested a legal opinion from the City Attorney of the City of Los Angeles as to whether the Commissioners of the Housing Authority '. . . as a matter of law, have the legal power to authorize and approve the payment, or reimbursement of, attorney fees, court costs, judgment or other legal expenses incurred or realized by any Commissioner, officer or employee of said Housing Authority in defending any legal action not involving moral turpitude (or if involving

moral turpitude, results in a favorable judgment for the defendant), civil or criminal, brought against said Commissioners, officers, or employees, in their official capacity or as individuals because of any collective action taken by them in the administration of the affairs of the Housing Authority . . .' The City Attorney of the City of Los Angeles on February 13, 1959, rendered an opinion that the Commissioners had the legal power to pay or reimburse for such expenses if the Housing Authority 'by proper action makes a provision as a general rule and regulation for the payment of such items as a valid obligation of the Authority.' Said opinion was in part based on Section 1956 of the Government Code which among other things authorized any public corporation to insure its officers and agents against any liability 'for injuries or damages resulting from their negligence or carelessness during the course of their service or employment.'

"V. On February 17, 1959, the Housing Authority adopted Resolution No. 2602 purporting to adopt such a general rule and regulation. Said resolution contains several recitals. One is to the effect that the Commissioners, officers, employees and agents of the Housing Authority are not now protected against personal liability resulting from their activities in the administration of the affairs of said Authority. Another recital is to the effect that said persons or some of them have in the past incurred personal expenses and potential liability resulting from such activities. Another recital determines it to be in the best interests of the Housing

Authority that said persons be protected from such personal liability and that the cost or expense of the Housing Authority in assuming or insuring same is for a public purpose.

"VI. That said resolution of the Housing Authority stated in pertinent part that the Housing Authority 'hereby assumes, as a valid legal obligation, any and all liability incurred by its Commissioners, officers, employees and agents . . . as the direct result of acts performed in good faith within the scope of their official authority or "under the color of office" including errors in judgment, but excluding wilful misconduct or acts committed with malice', subject to certain conditions. One of said conditions is that the past obligations thereby assumed must have been incurred or discovered during the three years immediately prior to the adoption of said resolution. Another condition is that the obligations incurred prior to the adoption of said resolution shall be paid by the Housing Authority as a self-insurer, from the Operation Reserve Fund and obligations incurred after the adoption of the resolution, were authorized to be covered by insurance through a private insurance carrier and if full coverage is not available, then the part not so covered is authorized to be paid by the Housing Authority as a self-insurer from the Operation Reserve Fund.

"VII. Said $36,537.17 paid by the Housing Authority to Holtzendorff on November 30, 1960, was paid by the Housing Authority pursuant to the provisions of said resolution.

"VIII. Pursuant to the stipulation of the parties at the time of the pretrial conference and referred to in the pretrial conference order, the cross complaint was deemed filed on May 11, 1964.

"IX. That the payment to Holtzendorff by the Housing Authority was made through mistake and inadvertence and that said payment constituted a gift of public funds and as such was void, illegal and unconstitutional.

"X. That the payment of November 30, 1960 was for a private and not for a public purpose. That the acts or offenses charged in the indictment in *People v.* Holtzendorff, were personal acts of Holtzendorff and not connected with his official duties. The paying of said legal expenses had no relation to a proper legislative purpose or any purpose of the Housing Authority authorized by any law.

"XI. It is true that Holtzendorff was found not guilty. The Commissioners had no authority to authorize said payment and Holtzendorff had no authority to receive it. At the time he received said payment, Holtzendorff was an agent of the Housing Authority.

"XII. Holtzendorff was required to repay this money upon demand; the filing of the cross complaint constituted such a demand which was the only demand made by cross complainant.

"XIII. Holtzendorff has failed to show any laches on the part of the Housing Authority in the filing of said cross complaint which resulted in any prejudice to Holtzendorff."

Conclusions of Law:

"(1) The payment of $36,537.17 by the Housing Authority to Holtzendorff on November 30, 1960 was for a private and not for a public purpose and constituted a void, illegal and unconstitutional gift of public funds.

". . . .

"(3) The claim of the Housing Authority is not barred by the statute of limitations as set forth in Section 338, subdivision 4 of Section 339, subdivision 1 of the California Code of Civil Procedure.

"(4) The claim of the Housing Authority is not barred by reason of laches.

"(5) The power of the Housing Authority as set forth in Sections 34311 to 34318, inclusive, of the California Health and Safety Code does not permit the use of its property or money in conducting any political campaign for whatever its purpose.

"(6) There is no reasonable basis upon which the Commissioners could determine that the Housing Authority could assume the legal expenses of its officers and agents in defending a criminal charge amounting to a felony not growing out of the performance of his legal duties.

"(7) The Commissioners had no authority to authorize the payment of Holtzendorff's legal fees for the defense of his personal criminal indictment; Holtzendorff had no authority to receive the said money; at the time Holtzendorff received the money, he was an agent of the Housing Authority and under such circumstances the law implies a promise to repay the money to his principle [*sic*] on demand.

"(8) The filing of the cross complaint constituted a demand for the return of the money advanced to Holtzendorff."

In seeking a reversal Holtzendorff argues that the payment was voluntary and intentional; that to warrant recovery on the theory of mistake it must be one of fact and not of law. In making this argument he overlooks the significant character of public funds—that they are trust funds. The significance of this factor is pointed up by the court in *Aebli v. Board of Education,* 62 Cal.App.2d 706 (hear. den.) where the court noted (p. 725) that ". . . generally speaking, where money is paid out by mistake by the state or an agency of government (whether by mistake of fact or mistake of law) it can be recovered back in many instances where, if paid out by an individual or private corporation it could not be. [Accord: *People v. Union Oil Co.,* 48 Cal.2d 476, 483.]

" 'The reason for this, and the theory underlying it, is that the funds paid out are public funds,—trust funds,—and not the property of an individual who can deal with them as he pleases.' "

In *Aebli,* the court cited *Norfolk County v. Cook,* 211 Mass. 390 [97 N.E. 778], where a public employee had been paid public funds to which, under a correct interpretation of the law in question, he was not entitled. The county brought an action to recover the funds so paid. The employee invoked the rule that money voluntarily paid under no mistake as to the facts could not be

recovered. The *Aebli* court quoted with approval the following from the decision of the Massachusett's court rejecting the public employee's contention:

> "'The rule is of very general application between individuals. . . . But public officers are dealing with money which is not their own and over which their powers are subject to well known limitations. They can pay when the law requires or permits, and they cannot pay when it forbids. So far as they act within their powers the public, whose agents they are, must abide the consequences. But when they act beyond their powers they do not bind their principals. The payment of this money in this case was not the act of the county, but simply the unauthorized act of a public officer. It was not the voluntary payment of money by the owner, but by one who had no beneficial interest in it and who was not authorized by the principal to make the payment. Manifestly one of the chief conditions for the application of the rule is wanting. To such a condition of things the rule does not apply; and such is the great weight of authority.'" (62 Cal.App.2d 726, 727.)[11]

The next question is whether the money paid by the Housing Authority to Holtzendorff was for a public purpose. The Housing Authority in adopting Resolution 2602 exceeded the limitations of section 1956 of the Government Code which limits public corporations in insuring its agents and employees "for injuries or damages resulting from their negligence or carelessness dur-

[11]See additional authorities cited at the bottom of page 727 and top of page 728 to the effect that "money paid out by a governmental agency under either mistake of fact or law may be recovered from the payee."

ing the course of their service or employment." This language could mean nothing else but within the scope of the legal duties of such agent or employee. The power of the Housing Authority as set forth in sections 34311 to 34318, inclusive, of the Health and Safety Code does not permit the use of its property or money in conducting any political campaign for whatever its purpose.

It is true that the courts have held that the determination of what constitutes a public purpose is primarily a matter for legislative discretion and such discretion will not be disturbed so long as it has a reasonable basis. (*County of Alameda v. Janssen,* 16 Cal.2d 276, 281.) But in the case at bar there is no reasonable basis upon which the Commissioners could determine that the Housing Authority could assume the legal expense of its officers and agents in defending a criminal charge amounting to a felony not growing out of the performance of his legal duties. The paying of such legal expense had no relation to a proper legislative purpose or any purpose of the Housing Authority authorized by any law.

The next question is whether or not the acts for which Holtzendorff was indicted were for acts within the scope of his legal duties or were they his personal acts unconnected with his official duties. The District Court of Appeal in the case of *People v. Holtzendorff,* 177 Cal.App.2d 788 at 806, makes it clear that the acts charged in the indictment against Holtzendorff were his personal acts unconnected with his official duties. The court stated: "It was the Authority's money that was appropriated and it went for services already rendered, but not to the authority, nor for any use or purpose in the lawful execution of defendant's trust. . . ."

Statute of Limitations

Holtzendorff argues that a cause of action for restitution of money illegally exacted is one for money had and received and that the two year limitation period of section 339, Code of Civil Procedure, is applicable. This does not represent the law in the factual context of the case at bench as shown by the decision in *People v. Union Oil Co.*, 48 Cal.2d 476. That was an action by the People to recover certain monies improperly paid to the oil company as interest on certain overpayments of franchise tax refunded to defendant for the income years 1942-1944. The court stated (p. 483):

> "Clearly a mistake of law was involved. Seeking relief from such mistake, plaintiff filed its complaint setting forth two causes of action. In the first it alleged, in substance, its improper payment of interest on the overpayments made by defendant for the period subsequent to July 9, 1947; the enactment of the 1947 amendment prohibiting such interest payments to defendant; the amount of interest properly allocable to defendant on its overpayments and the erroneous allowance made by the commissioner; and its demand upon defendant for repayment of the alleged improper interest payments—allegations sufficient to show plaintiff's theory of relief 'on the ground of mistake.' In the second cause of action, plaintiff pleaded the common count of money had and received, but this cause of action was based entirely upon the allegations for the first cause of action.
>
> "Defendant argues that while said mistake of law may have caused the improper interest payments, such mistake is merely incidental to plain-

> tiff's cause of action as one for money had and received, that no other ground of relief was available to plaintiff, and that therefore the two-year statute of limitations applies. . . . But here the mistake of law is not a mere incident to plaintiff's right to recovery. Rather it is the very basis or gravamen of plaintiff's action and if it were not for such mistake of law by the administrative officers, the cause of action would not have accrued. [Citation.] Accordingly, the applicable statute is the three-year statute governing an action for relief on the ground of mistake. (Code Civ. Proc., § 338, subd. 4.)"

It is thus established that the applicable statute of limitation is the three-year statute in section 338, subdivision 4, Code of Civil Procedure. The payment here in question was made on November 30, 1960, the original complaint was filed on April 18, 1963. Therefore the cross-complaint was filed within the three year period of limitations and recovery is not barred. (*Jones v. Mortimer,* 28 Cal.2d 627; *Goodwin v. Alston,* 130 Cal. App.2d 664.)

It is true that the cross-complaint was deemed filed on May 11, 1964. This was, of course, more than three years after the payment was made to Holtzendorff. It is upon this basis that he argues that the three year statute has run.

The principle that governs here is stated in *Jones, supra* (p. 633), in this language: "The statute of limitations is not available to plaintiff as to defendant's counterclaim if the period has not run on it at the time of commencement of plaintiff's action even though it has run when the counterclaim is pleaded. [Citations.]

. . ." The principle of *Jones* was applied in *Whittier v. Visscher,* 189 Cal. 450, 454, 456, where the cross demand was set up by cross-complaint. The court stated:

> "We will onsider next the cross-complaint. . . .
>
> ". . . .
>
> "It is next contended that the claim in this case is barred by the statute of limitations. It is conceded that it was not so barred when the original action was begun, and the authorities in this state seem to be agreed that if the right of action relied on was alive at the commencement of the suit the statute does not run against it, when, as in this case, the full statutory period has expired thereafter during the pendency of the action and before the claim is pleaded as a cross-complaint. [Citations.] . . ."

Under California statutes there is a broad area in which there is no true distinction between a cross-complaint and a counterclaim. A cross-complaint may be filed only when the affirmative relief sought by defendant constitutes a claim "relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought." (Code Civ. Proc., § 442.) Since 1927 there has been no comparable limitation upon the counterclaim, which merely need tend to diminish or defeat plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action. (*Case v. Kadota Fig Assn.*, 35 Cal.2d 596, 604; Code Civ. Proc., § 438.) "If the defendant's claim tends to diminish or defeat the plaintiff's recovery and also comes within the transaction or property clauses, it meets the tests of both C.C.P. 438 and C.C.P. 442. Un-

der these statutes it may be either a counterclaim or cross-complaint." (2 Witkin, California Procedure, §571.) "The true nature of the pleading will be determined from its allegations, regardless of its designation by the pleader as cross-complaint or counterclaim." (*Taliaferro v. Taliaferro,* 154 Cal.App.2d 495, 499.) In *Case, supra,* the court stated: "Therefore, regardless of the caption and introduction of Kadota's pleading, it may be treated as a counterclaim, if it satisfies the statutory requirements for a pleading of that kind." (P. 604.) The cross-complaint of the Housing Authority clearly meets all of the requirements of a counterclaim and may properly be so treated for the purpose of determining whether the statute of limitations has run against the Authority's cross demand. Applying the principle of *Jones* and *Whittier,* it is apparent that the statute of limitations had not run on the Housing Authority's cross demand.

The judgment on the cross-complaint in favor of the Housing Authority must be affirmed.

Each judgment is affirmed.

Fox, *J.**

We concur:

Files, *P. J.*

Kingsley, *J.*

*Retired Presiding Justice, Court of Appeal, sitting under assignment by the Chairman of the Judicial Council.

APPENDIX B.

The questions presented by this Petition are based on the United States Housing Act of 1937 as set forth in 42 U.S. Code §1401, and following. The particular sections of this Act to which this Petition is primarily directed are:

"(1) The term 'low-rent housing' means decent, safe, and sanitary dwellings within the financial reach of families of low income, and developed and administered to promote serviceability, efficiency, economy, and stability, and embraces all necessary appurtenances thereto. The dwellings in low-rent housing shall be available solely for families of low income. Except as otherwise provided in section 1421b of this title, income limits for occupancy and rents shall be fixed by the public housing agency and approved by the Administration after taking into consideration (A) the family size, composition, age, physical handicaps, and other factors which might affect the rent-paying ability of the family, and (B) the economic factors which affect the financial stability and solvency of the project." (42 U.S.C. § 1402(1)).

"(a) The Administration may make annual contributions to public housing agencies to assist in achieving and maintaining the low-rent character of their housing projects. The annual contributions for any such projects shall be fixed in uniform amounts, and shall be paid in such amounts over a fixed period of years. The Administration shall embody the provisions for such annual contributions in a contract guaranteeing their pay-

ment over such fixed period. . . ." (42 U.S.C. §1410).

"(b) Annual contributions shall be strictly limited to the amounts and periods necessary, in the determination of the Administration, to assure the low-rent character of the housing projects involved. Toward this end the Administration may prescribe regulations fixing the maximum contributions available under different circumstances, giving consideration to cost, location, size, rent-paying ability of prospective tenants, or other factors bearing upon the amounts and periods of assistance needed to achieve and maintain low rentals. Such regulations may provide for rates of contribution based upon development, acquisition or administration cost, number of dwelling units, number of persons housed, or other appropriate factors: *Provided,* that the fized contribution payable annually under any contract shall in no case exceed a sum equal to the annual yield, at the applicable going Federal rate plus 1 per centum, upon the development or acquisition cost of the low-rent housing or slum-clearance project involved." (42 U.S.C. §1410).

"(c) Every contract for annual contributions shall provide that whenever in any year the receipts of a public housing agency in connection with a low-rent housing project exceed its expenditures (including debt service, administration, maintenance, establishment of reserves, and other costs and charges), an amount equal to such excess shall be applied, or set aside for application, to purposes which, in the determination of the

Administration, will effect a reduction in the amount of subsequent annual contributions. In no case shall any contract for annual contributions be made for a period exceeding sixty years. . . ." (42 U.S.C. §1410).

"(a) The Administration may foreclose on any property or commence any action to protect or enforce any right conferred upon it by any law, contract, or other agreement. The Administration may bid for and purchase at any foreclosure by any party or at any other sale, or (pursuant to section 1421a of this title or otherwise) acquire or take possession of any project which it previously owned or in connection with which it has made a loan, annual contribution, or capital grant; and in such event the Administration may complete, administer, pay the principal of and interest on any obligations issued in connection with such project, dispose of, and otherwise deal with, such projects or parts thereof, subject, however, to the limitations elsewhere in this chapter governing their administration and disposition." (42 U.S.C. 1413).

"In order to insure that the low-rent character of housing projects will be preserved, and that the other purposes of this chapter will be achieved, it is provided that—

Low-rent-housing projects

(1) When a loan is made pursuant to section 1409 of this title for a low-rent-housing project the Administration may retain the right, in the event of a substantial breach of the condition (which shall be embodied in the loan agreement)

providing for the maintenance of the low-rent character of the housing project involved or in the event of the acquisition of such project by a third party in any manner including a bona-fide foreclosure under a mortgage or other lien held by a third party, to increase the interest payable thereafter on the balance of said loan then held by the Administration to a rate not in excess of the going Federal rate (at the time of such breach or acquisition except pursuant to paragraph (9) of this section) plus 2 per centum per annum or to declare the unpaid principal on said loan due forthwith." (42 U.S.C. §1415).

Slum-clearance projects

(3) When a contract for annual contributions is made pursuant to section 1410 of this title, the Administration shall retain the right, in the event of a substantial breach of the condition (which shall be embodied in such contract) providing for the maintenance of the low-rent character of the housing project involved, to reduce or terminate the annual contributions payable under such contract. In the event of the acquisition (except pursuant to paragraph (9) of this section) of such project by a third party in any manner including a bona-fide foreclosure under a mortgage or other lien held by a third party, such annual contributions shall terminate." (42 U.S.C. §1415).

"(a) Every contract for annual contributions (including contracts which amend or supersede contracts previously made) may provide that—

(1) Upon the occurrence of a substantial default in respect to the covenants or conditions to

which the public housing agency is subject (as such substantial default shall be defined in such contract), the public housing agency shall be obligated at the option of the Administration, either to convey title in any case where, in the determination of the Administration (which determination shall be final and conclusive), such conveyance of title is necessary to achieve the purposes of this chapter, or to deliver possession to the Administration of the project, as then constituted to which such contract relates: *Provided,* That such conveyance or delivery of title shall be subject to the rights of third parties vested pursuant to paragraph (9) of section 1415 of this title" (42 U.S.C. §1421).

APPENDIX C.

Agreement Between the Public Housing Administration and the Housing Authority of the City of Los Angeles for the Transfer and Possession of Projects CAL-4-1 Through CAL-4-10; CAL-4-13 Through CAL-4-17; and CAL-4-19 Through CAL-4-24, to the Public Housing Administration.

Whereas, the Housing Authority of the City of Los Angeles, California (herein called the "Local Authority") and the Public Housing Administration (herein called the "PHA") have heretofore entered into certain Annual Contributions Contracts and Administration Contracts (herein called the "Contracts") providing for financial assistance by the PHA to assist in achieving and maintaining the low-rent character of twenty-one low-rent housing projects therein described and designated as Projects Nos. CAL-4-1 through CAL-4-10; CAL-4-13 through CAL-4-17; and CAL-4-19 through CAL-4-24 (herein called the "Projects"); and

Whereas, by resolution of the Board of Commissioners of the Local Authority dated April 11, 1963 the Local Authority transferred and delivered the possession of the Projects to the PHA;

Now Therefore, in consideration of the mutual covenants set forth the parties hereto do agree as follows:

1. In accordance with the applicable provision of said Contracts the Local Authority hereby delivers to PHA possession of the said Projects as constituted on the date of the aforementioned resolution, including all real property or interest therein held in connection with such Projects, together with all easements, rights-of-way, and

all incorporeal hereditaments thereunto belonging or in anywise appertaining, and all personal property, tangible and intangible, or interest therein held in connection with such projects, including (but not limited to) equipment and apparatus, supplies, monies on hand and on deposit, reserves, securities, accounts receivable, choses in action, leases, contracts, books of account, papers and records, and the PHA hereby accepts such delivery and possession.

2. During the period in which the PHA holds possession of the Projects it may, in the name of and on behalf of the Local Authority or in its own name and on its own behalf, exercise any or all rights and privileges of the Local Authority pursuant to the Contracts and perform any or all of the obligations and responsibilities of the Local Authority pursuant to said Contracts. In the operation of the Projects the PHA will cooperate and consult with the Commissioners of the Local Authority and to the greatest extent possible operate the Projects in accordance with the general policies of said Commissioners.

3. Neither the delivery and transfer of possession of the Projects to the PHA nor the acceptance of such possession by the PHA shall (a) abrogate or affect in any way any indebtedness of the Local Authority to the PHA arising under said Contracts, and in no event shall any such delivery and transfer or any such acceptance be deemed to constitute payment or cancellation of any such indebtedness or (b) in any manner affect the legal title of the Projects in the Local Authority.

4. Upon the curing of the situation, as described in the above-mentioned resolution, which has caused the

Local Authority to transfer possession of the Projects, the PHA shall redeliver possession as required by Section 22(a)(2) of the United States Housing Act (42 U.S.C. 1421a(a)(2)) and the Contracts.

In Witness Whereof, the Local Authority and the PHA have caused this Agreement to be executed in their respective names and have caused their respective seals to be hereunto affixed and attested as of this 11th day of April, 1963.

Housing Authority of the City
of Los Angeles, California
By Julian R. Blodgett
Chairman

Public Housing Administration
By W. P. Offricht
for Commissioner

(Seal)

Attest:

E. H. DELONG Acting Secretary

(Seal)

Attest:

APPENDIX D.

Affidavit of Marie C. McGuire.

United States of America, District of Columbia—SS.

Marie C. McGuire, being first duly sworn upon oath, deposes and states:

1. That she is the Commissioner of the Public Housing Administration.

2. That as such she is authorized to exercise all of the powers and functions vested in her under the United States Housing Act of 1937 as amended (42 U.S.C. § 1401 et seq.).

3. That at the request of Julian R. Blodgett, Chairman of the Housing Authority of the City of Los Angeles (hereinafter referred to as Housing Authority), Robert F. Reynolds, the former legal counsel for the Authority by letter dated February 22, 1963, to Joseph Burstein, General Counsel of the Public Housing Administration (hereinafter referred as PHA), asked for the opinion of the PHA as to the effect of the two outstanding employment contracts with Howard L. Holtzendorff and Barbara Rosien on the power and authority of the Commissioners and their obligations to the PHA under the existing Federal financial assistance contracts between the Housing Authority and the PHA. At the time of this requested opinion, Mr. Holtzendorff and Miss Rosien had filed suits for declaratory judgment to test the validity of their employment contracts.

4. That by a letter dated February 26, 1963, a copy of which is attached and made part of this affidavit, the General Counsel of the PHA responded to the above inquiry and stated the position of the PHA on the pur-

ported employment contracts of Mr. Holtzendorff and Miss Rosien. In pertinent part this letter stated that:

> "We have already stated our opinion in answer to your previous question that our Contracts hold the Commissioners, from time to time validly appointed, completely responsible for carrying out their provisions whether they relate to policy making or administration. We further agree with your position that any attempt by any Commissioner to divest themselves or their successors of this responsibility is not authorized by these Contracts and has never been agreed to by the PHA.
>
> The quoted provisions of the April 19 agreement would disenable your Board during the term of appointment, from increasing or decreasing the nature and scope of the administrative duties of an employee in whom is combined the comprehensive powers of Executive Director, Secretary and Treasurer of the Housing Authority, without the consent of that employee. This provision, in our opinion, constitutes a purported divesting of power which the PHA could not and would not recognize under our Contracts with the Housing authority. The PHA would, accordingly, be required to consider this provision null and void and will continue to hold the Board of Commissioners fully and completely responsible for all functions, obligations and responsibilities connected with the Contracts between the Authority and the PHA whether they be administrative or any other."

5. That subsequently on April 11, 1963, the Board of Commissioners of the Housing Authority passed a Resolution, a copy of which is attached and made part

of this affidavit, authorizing the delivery of possession of the 21 federally assisted low-rent projects under its jurisdiction to the PHA; and recognizing that the Housing Authority was in default under the Federal financial assistance contracts, the affiant, through a duly authorized agent, W.P. Offricht, executed an agreement under which the possession of the federally aided projects in the City of Los Angeles was transferred to the PHA.

6. That the PHA is now in possession and is operating the federally aided projects formerly administered by the Housing Authority, such possession and operation being pursuant to the authority in Section 22 of the United States Housing Act of 1937, as amended, (42 U.S.C. § 1421a (a) (2)), the outstanding financial assistance contracts and an agreement between the Authority and PHA executed on April 12, 1963, copy of which is attached and made a part of this affidavit.

7. That pursuant to the authorization of the Board of Commissioners of the Authority, Mr. Jack Hildreth, special trial counsel in the litigation styled *Howard L. Holtzendorff and Barbara Rosien v. The Housing Authority of the City of Los Angeles*, No. 817285, pending in the Superior Court of the State of California in and for the County of Los Angeles, requested the affiant to state the present position of the PHA regarding this litigation and its effect on the relationship between the Housing Authority and the PHA.

8. That it is the present intention of the PHA to take all necessary actions, including but not limited to the retention of the possession and operation of the federally aided projects in the City of Los Angeles, to avoid or prevent any charge to said projects of all or

any part of a judgment that might be rendered against the Housing Authority because of the litigation involving the purported employment contracts with Howard L. Holtzendorff and Barbara Rosien, or to avoid or prevent any of the revenues or assets appertaining to said projects from being used to satisfy any such judgment, said purported employment contracts, in the opinion of PHA, being illegal and totally void for the reason that they are inconsistent with the Housing Authority's obligations under the outstanding Federal financial assistance contracts.

/s/ MARIE C. McGUIRE,
Marie C. McGuire
Commissioner
Public Housing Administration

United States of America, District of Columbia—SS

Subscribed and sworn to before me this 25th day of March, 1964.

(Seal)

[Illegible]
Notary Public

My commission expires 10-31-67.

APPENDIX E.

(Defendant's Exhibit 4)

Agreement.

This Agreement, made and entered into this 19th day of April, 1961, by and between the Housing Authority of the City of Los Angeles, California, a public body, corporate and politic, organized and existing by virtue of the laws of the State of California, hereinafter referred to as the "Authority," and Howard L. Holtzendorff, a resident of Los Angeles, California, hereinafter referred to as "Employee," bears witness to the following:

Whereas, the Authority now owns and operates twenty-one (21) permanent low-rent public housing developments representing a capital investment of approximately $63,500,000.00; and

Whereas, Employee has continuously and safistactorily served the Authority as Secretary, Executive Director and Treasurer since February 1, 1941, under written agreements for various fixed periods of time; and

Whereas, both Authority and Employee agree that the present Agreement between Authority and Employee dated the 18th day of December, 1956, should be rescinded and a new Agreement entered into; and

Whereas, in order to assure itself of said continued services and in order to protect Authority's investment in Employee's long and valuable training and experience, it is hereby determined to be necessary and convenient and in the best interests of the Authority to assure itself of the continued services of Employee by

entering into another written Agreement for another fixed period of time; and

Whereas, Section 34278 of the California Health and Safety Code specifically authorizes Authority to employ such employees as it requires and to determine their qualifications, duties, terms of employment and compensation; and

Whereas, Section 34314 of the California Health and Safety Code specifically authorizes Authority to arrange for personal services by Contract;

Now Therefore in consideration of the mutual covenants and agreements herein contained, the parties hereto do hereby covenant and agree as follows:

1. The Authority hereby designates and employs Employee to serve the Authority in operating said housing developments, and in the construction or operation of all other housing developments which may hereafter come under its jurisdiction, in the administrative capacity of Secretary, Executive Director and Treasurer under the supervision and control of the Commissioners of the Authority. In this connection it is mutually agreed and understood that the powers, duties and functions of Employee shall be administrative only and at all times shall be in accordance with the By-laws and Manual of Policy and Procedure as established or changed by the Commissioners of the Authority from time to time. However, in this connection, it is mutually understood and agreed that the nature and scope of said administrative duties will neither be increased nor decreased during the period of this Agreement without the written consent of Employee.

Notwithstanding any present or future provision of the By-laws or Manual of Policy and Procedure of Authority that might be otherwise interpreted, it is specifically understood and agreed that Employee has not and will not be delegated or authorized to exercise any policy making responsibility or authority of any kind, including, but not limited to, the police powers of the Authority. It is clearly understood that all such powers are reserved to the Commissioners of Authority in office from time to time and shall only be exercised by them.

2. Employee hereby agrees to accept said designation and employment and agrees to serve the Authority to the full extent of Employee's skill and ability and perform all the administrative duties incident to the position of Secretary, Executive Director and Treasurer except the duties of Secretary and Treasurer authorized to be delegated, or delegated to, the Assistant Executive Director and Fiscal Officer pursuant to Section 101:2 of Authority's Manual of Policy and Procedure in effect as of the date of this Agreement. It is also mutually agreed that Section 6 of the By-laws of Authority is not to be interpreted contrary to Sections 1 and 2 of this Agreement. Since the services to be rendered hereunder are of special, unique, extraordinary and intellectual character, said Employee hereby agrees that during the term of employment as set forth in Paragraph 3, he will not enter the employment of any other firm, association, corporation or governmental agency without approval of the Authority.

3. Term of Employment. The term of said designation and said employment by Authority shall commence as of the 19th day of April 1961, and shall continue to and including the 31st day of December, 1967.

4. Compensation

(a) Salary

The Authority agrees to pay Employee and Employee agrees to accept, as salary for the services hereinbefore mentioned, the sum of Twenty-One Thousand Seven Hundred Dollars ($21,700.00) per annum, for the full term of said employment as set forth in Paragraph 3 hereof, payable regularly in consecutive bi-weekly installments.

(b) Vacation, sick leave, social security, health and welfare, life insurance and retirement benefits. In addition to the salary set forth in sub-paragraph (a) of this Paragraph 4, the Authority agrees and hereby grants Employee the same vacation, sick leave, social security, health and welfare, life insurance and retirement benefits now granted, or during the term of employment as set forth in Paragraph 3 hereinabove, is granted, to other employees of Authority.

(c) Use of Authority owned passenger vehicle. In addition to the salary set forth in sub-paragraph (a) of this Paragraph 4, Authority agrees and hereby grants Employee the exclusive use of one of Authority's passenger vehicles as authorized by Resolution No. 2686 adopted by the Commission on September 20, 1960.

5. Authority agrees that it will at all times during the term of this Agreement periodically make and con-

tinuously maintain adequate financial provision to the end that all obligations assumed by it pursuant to this Agreement will be properly and timely discharged.

6. In the event said Employee hereafter during any period of armed conflict with a foreign power enters into the military service of the United States of America, he will be granted a leave of absence without pay for the period of time he is on active duty in said military service. That upon being released from said active duty in said service he will be restored to his position of Secretary, Executive Director and Treasurer, and the term of employment as set forth in Paragraph 3 hereof shall be extended from and after the termination date in said Paragraph 3 hereof for the full period of said military service.

7. Authority agrees that all obligations assumed by it pursuant to this Agreement shall be binding upon its successors or assigns. Employee agrees that this Agreement may not be assigned by him. Employee and Authority agree that this Agreement may be amended only by the mutual consent of the parties thereto.

8. It is mutually agreed that if any one or more paragraphs, clauses, sentences or parts of this Agreement shall for any reason be adjudged invalid, such judgment shall not effect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provisions so held invalid, and the invalidity of any paragraph, clause or provision of this Agreement, in any one or more instances or cir-

cumstances, shall not be taken to affect or prejudice in any way its validity in any other instance.

9. It is mutually agreed that the present employment contract between Authority and Employee dated the 18th day of December, 1956, be and is hereby rescinded as of the date of this Agreement.

Housing Authority of the City of Los
Los Angeles, California
By Geo. A. Beavers, Jr.
GEO. A. BEAVERS, JR.
Chairman
Howard L. Holtzendorff
HOWARD L. HOLTZENDORFF
Employee

(Seal)

Attest:
Barbara Rosien
Assistant Secretary

Approved as to form and
Legality
James J. Arditto
General Counsel

(Defendant's Exhibit 5)

Agreement.

This Agreement, made and entered into this 19th day of April 1961, by and between the Housing Authority of the City of Los Angeles, California, a public body, corporate and politic, organized and existing by virtue of the laws of the State of California, hereinafter referred to as the "Authority", and Barbara Rosien, a resident of Los Angeles, California, hereinafter referred to as "Employee", bears witness to the following:

Whereas, the Authority now owns and operates twenty-one (21) permanent low-rent public housing developments representing a capital investment of approximately $63,500,000.00; and

Whereas, Employee was the first employee of the Authority, having been employed on July 26, 1938, and having since continuously and satisfactorily served the Authority as Assistant Secretary and Assistant Executive Director; and

Whereas, both Authority and Employee agree that the present Agreement between Authority and Employee, dated February 19, 1958, should be rescinded and a new Agreement entered into; and

Whereas, in order to protect the Authority's investment in Employee's long and valuable training and experience, it is hereby determined to be in the best in-

terests of the Authority to assure itself of the continued services of Employee; and

Whereas, in order to assure itself of said continued services it is hereby determined to be necessary and convenient to provide Employee reasonable tenure of employment; and

Whereas, Section 34278 of the California Health and Safety Code specifically authorizes the Authority to employ such employees as it requires and to determine their qualifications, duties, terms of employment and compensation; and

Whereas, Section 34314 of the California Health and Safety Code specifically authorizes the Authority to arrange for personal services by Contract;

Now Therefore in consideration of the mutual covenants and agreements herein contained, the parties hereto do hereby covenant and agree as follows:

1. The Authority hereby designates and employs Employee to serve the Authority in operating said housing developments, and in the construction or operation of all other housing developments which may hereafter come under its jurisdiction, in the administrative capacity of Assistant Secretary and Assistant Executive Director under the general supervision of the Secretary and Executive Director.

2. Employee hereby agrees to accept said designation and employment and agrees to serve the Authority to the full extent of Employee's skill and ability

and perform a duties incident to the position of Assistant Secretary and Assistant Executive Director. In this connection it is mutually agreed and understood that the powers, duties, and functions of Employee shall be administrative only and at all times shall be in accordance with policy and procedure as established by the Commissioners of the Authority from time to time. However, in this connection, it is mutually understood and agreed that the nature and scope of said administrative duties will neither be increased no [sic] decreased during the period of this Agreement without the written consent of Employee.

Since the services to be rendered hereunder are unquie and require special training, skill and experience, said Employee hereby agrees that during the term of employment as set forth in Paragraph 3, she will not enter the employment of any other firm, association, corporation or governmental agency without approval of the Authority.

3. Term of Employment: The term of said designation and said employment by the Authority shall commence as of the 19th day of April, 1961, and shall continue to and including the 31st day of December 1967.

4. Compensation:

(a) Salary

The Authority agrees to pay Employee and Employee agrees to accept, as salary for the services hereinbefore mentioned, the sum of Sixteen Thousand Five Hundred Dollars ($16,500.00) per annum, for the full term of said employment as set forth in Paragraph 3 hereof, payable regularly in consecutive bi-weekly installments.

(b) Vacation, sick leave, social security, health and welfare, life insurance and retirement benefits.

In addition to the salary set forth in sub-paragraph (a) of this Paragraph 4, the Authority agrees and does hereby grant Employee the same vacation, sick leave, social security, health and welfare, and life insurance and retirement benefits now granted, or during the term of employment as set forth in Paragraph 3 hereinabove, is granted, to other employees of the Authority.

(c) Use of Authority owned passenger vehicle.

In addition to the salary to the salary set forth in sub-paragraph (a) of this Paragraph 4, Authority agrees and hereby grants Employee the exclusive use of one Authority owned passenger vehicle as authorized by Resolution No. 2686 adopted by the Commission on September 20, 1960.

5. Authority agrees that it will at all times during the life of this Agreement periodically make and continuously maintain adequate financial provision to the end that all obligations assumed by it pursuant to this Agreement will be properly and timely discharged.

6. Authority agrees that all obligations assumed by it pursuant to this Agreement shall be binding upon its successors or assigns. Employee agrees that this Agreement may not be assigned by her. Employee and Authority agree that this Agreement may be amended only by the mutual consent of the parties thereto.

7. It is mutually agreed that if any one or more paragraphs, clauses, sentences or parts of this Agreement shall for any reason be adjudged invalid, such judgment shall not effect, impair or invalidate the remaining provisions thereof, but shall be confined in its

operation to the specific provision of this Agreement, in any one or more instances or circumstances shall not be taken to affect or prejudice in any way its validity in any other instance.

8. It is mutually agreed that the present employment contract between Authority and Employee dated the 19th day of February 1958, be and is hereby rescinded as of the date of this Agreement.

Housing Authority of the City of
Los Angeles, California
By George A. Beavers, Jr.
Chairman
Barbara Rosien
Employee

(Seal)

Attest:
Howard L. Holtzendorff
Secretary

Approved as to form and
Legality
James J. Arditto
General Counsel

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IN THE

Supreme Court of the United States

October Term, 1967
No. 763

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, a body corporate and politic,

Petitioner,

vs.

HOWARD L. HOLTZENDORFF and BARBARA ROSIEN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Jurisdiction.

The within Court is without jurisdiction to review the judgment entered below in the State court, for the reason that no federal question was raised or decided below. 28 U.S.C., sec. 1257, therefore, does not sustain the jurisdiction, but rather, negates it. [*Newsom v. Smyth,* 365 U.S. 604; *Patterson v. Stanolind Oil etc. Co.,* 305 U.S. 376, 379.]

Statute Involved.

The only statute involved in the questions here sought to be presented by petitioner is section 389 of the California Code of Civil Procedure. It is found in the official edition in California Statutes, 1957, c. 1498, p.

2824. The statute deals generally with who is an indispensable party to litigation maintained in the State courts of California. Its provisions are set forth *verbatim* in the Appendix to this brief.

Counter-Statement of Question Presented.

In an action in the State court, wholly between residents and a public corporation of the forum state, for breach of a local contract, to which contract only the litigants were parties, and in which action no issue of federal law or right was raised or decided, is it a denial of federal right to deny a motion of one of the parties to join a federal administrative official as an alleged indispensable party, the denial of the motion being based, entirely as a matter of state law, on the provisions of a general state statute which, without discrimination against or separate reference to federal agencies or officials, defines who are indispensable parties to an action in the State courts?

Counter-Statement of the Case.[1]

---

[1]The following abbreviations are used in this brief:

"App."—Appendix.

"Authority"—The petitioner Housing Authority of the City of Los Angeles.

"Clk. Tr."—Clerk's Transcript.

"H. & S. Code"—California Health & Safety Code.

"Pet."—Petition for a Writ of Certiorari.

"PHA"—Public Housing Administration of the United States.

"Rep. Tr."—Reporter's Transcript on Appeal.

"Rev. Rules"—United States Supreme Court Revised Rules (1954).

"Supp. Clk. Tr."—Supplemental Clerk's Transcript.

The caption of this cause as printed on the cover of the petition is incorrect. It is in fact the caption of the cause in the State Court of Appeal below. The correct caption, showing the Authority as the petitioner here is printed on page 1 of the petition.

1. Petitioner's statement of the case is noteworthy for the positiveness and unqualified sweep of the assertions in it; and, as well, for the paucity of references to the record on appeal, to which, if there were any evidential support for those assertions, it would have been easy to refer.

There is also a glaring omission of an essential fact from petitioner's statement. There are repeated references in the petition to the provisions of a "contributions contract" between PHA and the petitioner. An asserted conflict between that contract and the employment contracts in suit, leading to the alleged invalidity of the latter [see, *Pet.*, 4-7, 9-11, 15-20, 22, 25-26], is strongly relied on as a reason why certiorari should be granted. Yet, there is no mention in the petition of the fact that the contributions contract, though offered by petitioner, was excluded from evidence. [Rep. Tr., p. 109, line 20, to p. 113, line 1.] No exception to that ruling was ever taken, and it was not specified as error on the petitioner's appeal. [See, footnote 17, *infra.*] All references by petitioner to the contributions contract, are, therefore, entirely outside the record [see, footnote 19, *infra*]; and there is no decision in respect of it to be reviewed.

Another notable omission from the petition is the omission to refer to any proceedings or evidence that would give rise to the "Questions Presented for Review" [*Pet.* 3. See, Points III and IV, *infra.*] The ommission is understandable; there were no such proceedings or evidence.[2]

---

[2]The only one of the questions now presented that was raised and decided below was the state-law question whether the PHA commissioner was an indispensable party [See, Point I, *infra.*]

That part of petitioner's statement of the case that deals with the statutory and contractual background of the relationship between PHA and the Authority [*Pet.* 4-8], is similarly incomplete and inaccurate. The contract, as we have shown, is not here, indeed, was not received in evidence below; and the statute upon which Petitioner relies does not give PHA such control over the Authority's operations and affairs as petitioner asserts. [See, Point II, *infra.*]

2. The petitioner, Housing Authority of the City of Los Angeles is a public corporation organized and existing under and by virtue of the Housing Authorities Law of the State of California.[3] [Clk. Tr., p. 18, lines 22-25 (allegation not denied, Clk. Tr., p. 35, lines 19-25); p. 80, line 20.] In that Law the Authority is described as "a public body corporate and politic." [*H. & S. Code,* secs. 34240, 34310.] Despite its name, it is not an agency of the City of Los Angeles, but an administrative agency of the State of California, organized to effectuate that State's policy of eliminating slums and providing low-rent public housing for persons of low income. [*H. & S. Code,* secs. 34201, 34212, 34312. See, also: *Housing Authority v. Los Angeles,* 38 Cal. 2d 853, 861-862, 243 P. 2d 515, 519; *Housing Authority v. Superior Court,* 35 Cal. 2d 550, 559, 219 P. 2d 457, 462.]

This "public body corporate and politic" has "all the powers necessary or convenient to carry out the pur-

[3]The "Housing Authorities Law" [see *H. & S. Code,* sec. 34200] is Chapter 1 (beginning with section 34200) of Part 2 of the Health & Safety Code of the State of California. [Cal. Stats., 1938, Ex. Sess., c. 4, p. 10.] It has been amended several times. In the respects here involved, it will be most convenient to refer to it as published in volume 41A of West's Annotated California Codes, where it appears as amended through 1966.

poses and provisions of" the Housing Authorities Law. Among the specific powers with which it is endowed by the statute, are: (1) to sue and be sued [*H. & S. Code,* sec. 24311(a)]; (2) to make and execute contracts [*H. & S. Code,* sec. 34311(d)]; and (3) to employ a secretary, who shall be executive director, and such other officers, agents, and employees as it requires and, among other things, determine their compensation and the terms of their employment. [*H. & S. Code,* sec. 34278.[4]]

The Authority has developed and operates a number of low-rent housing projects, which produce revenues. [Rep. Tr., p. 218, line 8, to p. 221, line 11.] Some of these projects were relinquished to it by PHA. [Rep. Tr., p. 501, line 14, to p. 507, line 15; p. 1109, line 15, to p. 1110, line 6.] It received some financial assistance from PHA by way of loans and contributions; but, the extent of and terms upon which that assistance was rendered are not shown in the record. Neither

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[4]Section 34278, in its entirety, reads as follows:

"An authority shall select from among its commissioners a vice chairman. It may also employ a secretary, who shall be executive director, technical experts, and such other officers, agents, and employees as it requires, and shall determine their qualifications, duties, terms of employment and compensation." [Cal. Stats. 1951, c. 710, p. 1952, as amended Cal. Stats. 1953, c. 1802, p. 3587, and Cal. Stats. 1957, c. 764, p. 1978.]

Pursuant to this power the respondents, Howard L. Holtzendorff and Barbara Rosien, were duly employed as Secretary and Assistant Secretary, respectively, under written contracts of employment which specified the terms of their employment and the compensation to be paid them. It was to recover damages for the wrongful discharge from that employment that this action was brought. Upon jury verdicts expressly finding that the discharge was without "just or lawful cause" and awarding substantial damages [Rep. Tr. p. 2024, lines 1-14; Clk. Tr. p. 79, lines 6-8, 27-32. Supp. Clk. Tr. p. 410, lines 17-29] the judgment here sought to be reviewed was entered.

is it shown whether there is any outstanding indebtedness owing PHA or any lien or charge upon the Authority's property in favor of PHA. [Rep. Tr., p. 220, line 10, to p. 221, line 11.] PHA was not a party to the employment contracts in suit; and, so far as can be gathered from the record, nothing in the relationship between the Authority and PHA gave the latter any control over or interest in those contracts.[5] [See, Point II, *infra.*]

3. The respondent Barbara Rosien was first employed by the Authority, as Assistant Secretary, in 1938; the respondent Howard Holtzendorff was employed as Secretary and Executive Director on February 1, 1941. The two of them served continuously in their respective positions until their wrongful discharge on March 26th, 1963. [Supp. Clk. Tr., p. 398, lines 9-21; p. 399, line 1, to p. 400, line 19; p. 401, line 27, to p. 403, line 15; p. 407, lines 7-12. Rep. Tr., p. 30, line 20, to p. 32, line 4; p. 217, line 23, to p. 218, line 3; p. 222, line 24, to p. 223, line 11; p. 326, line 22, to p. 333, line 4; p. 741, line 25, to p. 742, line 25; p. 755, lines 10-20; p. 968, line 18, to p. 969, line 24; p. 1042, line 9, to p. 1043, line 15; p. 1526, line 3, to p. 1527, line 2.]

At the time of the wrongful discharge the respondents were working under written contracts of employment, which had been duly authorized by the Authority's governing board. These contracts fixed the term of

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[5]Petitioner frequently asserts that PHA had the right to audit the Authority; and from that right it deduces some power of fiscal and operational control. Petitioner does not specify where in the record the source of that power can be found. It is not in the Housing Act of 1937; nor can it be assumed to be in the "contributions contract," which is not in evidence or in this record. [See, Point II, *infra.*]

employment as one ending December 31, 1967, as well as the compensation to be paid the employees and the other terms of employment.[6] [Clk. Tr., p. 79, lines 6-26. Rep. Tr., p. 7, line 18, to p. 8, line 20; p. 357, line 1, to p. 366, line 1; p. 372, lines 16-25; p. 373, line 1, to p. 376, line 6.]

For at least six years or so, immediately preceding execution of the employment contracts that were current at the time of the wrongful discharge, the respondents had been employed under similar written contracts fixing the duration, compensation and other terms of their employment. [Rep. Tr., p. 7, line 19, to p. 11, line 6; p. 394, line 16, to p. 396, line 4. Clk. Tr., p. 79, lines 6-8; p. 80, lines 7-14; Supp. Clk. Tr., p. 401, line 27, to p. 403, line 15.] Each year PHA audited the Authority's accounts; and about every three years (the latest one prior to the trial of this cause was in 1961) PHA made a comprehensive review of the operations of the Authority and transmitted to it an extensive report of its findings, exceptions and recommendations. At no time did PHA ever except or object to the employment contracts with respondents or to the payment of the compensation called for thereby. [Rep. Tr., p. 44, line 13, to p. 45, line 18; p. 442, line 14, to p. 443, line 5; p. 644, line 24, to p. 652, line 5; p. 839, line 17, to p. 841, line 25; p. 917, lines 13-19; p. 1291, lines 5-17.]

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[6]The contracts were received in evidence in the trial court [Rep. Tr. p. 7, line 19, to p. 8, line 20] and were part of the record on appeal below. [Clk. Tr., p. 134, lines 24-26.] They have not been included by the petitioner in the record it caused to be certified to this Court. Indeed, none of the more than 138 documentary exhibits received below [see, Rep. Tr., vol. 1, pp. iii-xii] has been brought here.

PHA's audit report for 1961 (the latest one available at the time of trial) may be taken as a typical example of PHA's auditing and reporting procedures. The petitioner's fiscal officer, reviewing the PHA audit report for the information of the Authority's governing board, said that the report was correct and, inasmuch as there were no audit findings in it, the indications were that "all fiscal operations and expenditures [of the Authority] have been reviewed for compliance with Public Housing Administration policies, standards and contractual provisions, as well as this agency's policies and found to be fully in accordance therewith."[7] [Rep. Tr., p. 442, line 14, to p. 443, line 5; p. 839, line 17, to p. 841, line 25.]

4. On March 26, 1963, the respondents were discharged from their employment [Clk. Tr., p. 73, lines 8-12; p. 79, lines 6-8, 27-32] without just or lawful cause: [Supp. Clk. Tr., p. 410, lines 21-30.] They then brought this action against the Authority to recover

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[7]So much of a substantive point as petitioner seems to have in this proceeding consists of the constant repetition of the contention that the employment contracts were invalid because contrary to the "contributions contract" assertedly executed by PHA and the Authority. [See, *e.g., Pet.*, 9, 15-18, 22, 25, 31.] As we have just seen, PHA's own audit, as well as the report of the petitioner's fiscal officer shows, in complete destruction of that contention, that "*all* [of the Authority's] *fiscal operations and expenditures* [were] reviewed for compliance with Public Housing Administration policies . . . and *contractual provisions* . . . and found to be fully in accordance therewith." (Italics ours.) Obviously, PHA has waived any contention that the employment contracts or use of Authority funds to pay the contract compensation was in violation of the contractual arrangements with PHA.

From this it follows there was no "default" upon which to base any take-over of the Authority's projects by PHA. [See, *Pet.* 18-19.] In point of fact, petitioner's Chairman testified, without contradiction, that there had never been a claim or contention by PHA that the Authority had defaulted or was in default under any of its contracts with PHA. [Rep. Tr., p. 107, lines 1-20.]

damages for that discharge. The Authority was the only party-defendant. [Clk. Tr., p. 1, lines 14-16.] After an extended trial on the merits, general and special verdicts were returned in favor of respondents; and a judgment was entered thereon. [Supp. Clk. Tr., pp. 476-479.] The Authority appealed. [Clk. Tr., p. 133, lines 18-28.] The judgment was affirmed by the State Court of Appeal. The State Supreme Court, without opinion, denied the Authority's petition for a hearing.

Before trial, and in accordance with the California practice, a joint pre-trial statement was agreed to by the parties; and a pre-trial order was made by the trial court, based on that statement. [Clk. Tr., pp. 68-88.] The issues of law and fact to be tried were thereby defined and limited.[8] With the single exception of the question whether the Commissioner of PHA was an indispensable party [Clk. Tr., p. 86, lines 31-32], no issue pertaining to any of the questions petitioner now seeks to present was embraced within that definition. More particularly, there was no issue whatever pertaining to any supposed invalidity of the employment contracts because, assertedly, they were in violation of any contract with PHA or because, assertedly,

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[8]In the California practice, the pre-trial order "becomes a part of the record in the case and, where inconsistent with the pleadings, controls the subsequent course of the case unless modified at or before trial to prevent manifest injustice . . ." [*Cal. Rules of Court,* rule 216.] The effect of the pre-trial order, therefore, if not modified (and it was not modified in the case at bar), is to limit trial of the cause to the issues defined in the order. [*County of Kings v. Scott,* 190 Cal. App. 2d 218, 225, 11 Cal. Rptr. 893, 897-898; *People v. Valley Drive-In etc. Corp.,* 206 Cal. App. 2d 309, 313-314, 23 Cal. Rptr. 626, 629-630; *City of Los Angeles v. County of Mono,* 51 Cal. 2d 843, 847, 337 P. 2d 465, 468.]

The rule cited may be found in *West's Annotated California Codes,* vol. 23, Pt. 2, p. 30.

they had been declared invalid by PHA. In fact, when the contributions contract was excluded from evidence [Rep. Tr., p. 109, lines 20-26; p. 111, line 23, to p. 112, line 25], one of the grounds of objection to it was that "the validity or invalidity of the employment contracts under the contributions contract is *not an issue in this case*; it was not made an issue by the pleading; it was not made an issue by the pretrial order."[9] [Rep. Tr., p. 110, lines 20-26. Italics ours.]

5. About a month after this action was commenced [Clk. Tr., p. 1, lines 2-7], petitioner made a motion to join Marie C. McGuire, Commissioner of the Public Housing Administration, as an indispensable party, on the ground that she "is such a party."[10] [Supp. Clk. Tr., p. 1, lines 21-31.] The factual showing made in support of the motion was only that, under a contract between the Authority and PHA—not, it should be noted, the "contributions contract"—executed April 11, 1963, possession of certain of the Authority's projects

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[9]The issues that were defined related to: (a) whether the respondents were discharged and what was the amount of their damages [Clk. Tr., p. 83, line 12, to p. 84, line 25; p. 85, lines 21-29; p. 87, lines 5-10]; (b) whether there was justification for the discharge [Clk. Tr., p. 84, line 27, to p. 85, lines 7-20]; (c) whether the contracts were invalid because, under State law, they were for too long a term; or delegated non-delegable duties; or made a gift of public funds; or lacked consideration. [Clk. Tr., p. 85, line 30, to p. 86, line 30; p. 87, lines 11-17.]

Petitioner contended, but respondents denied, that certain other matters—none relating to the questions here sought to be presented by petitioner—were issues to be tried. [Clk. Tr., p. 87, line 18, to p. 88, line 7.] Petitioner can have no grievance in this respect, as the trial court entertained and decided those issues. [Supp. Clk. Tr., p. 400, line 21, to p. 401, line 25; p. 403, line 17, to p. 407, line 11.]

[10]Contrary to petitioner's statement [*Pet.*, 12], this motion was not an oral one, but was made in writing and was based upon a Declaration (or affidavit) in support of it. [Supp. Clk. Tr. pp. 1-6.]

had been turned over to PHA, and that because of that fact the Authority's Commission was without power or ability to prosecute or defend the litigation.[11] [Supp. Clk. Tr., p. 4, lines 13-32; p. 6, lines 7-13.] The motion was denied without opinion. [Clk. Tr. p. 17.]

One year later, the Authority again moved to join Marie C. McGuire, Commissioner of the Public Housing Administration, as an indispensable party. [Supp. Clk. Tr., pp. 369-370.] The notice of motion stated no grounds upon which the motion would be made; the notice did state, however, that the motion would be based upon "the Declaration of Jack E. Hildreth, attached" thereto.[12] [Supp. Clk. Tr., p. 370, lines 1-5.]

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[11]Of course, transfer of possession of the Authority's property, or even delegation of internal management or direction, to persons other than those charged by law with the management, did not destroy or impair the Authority's corporate entity or its existence as a juridical person. It, therefore, had the power and ability to prosecute or defend, regardless of what person or group of persons may have been in directorial control of its affairs. [See, *e.g., Dean v. Davis*, 51 Cal. 406, 409; *Miller v. McColgan*, 17 Cal. 2d 432, 436, 110 P. 2d 419, 421; *Dandini v. Dandini*, 120 Cal. App. 2d 211, 216-217, 260 P. 2d 1033, 1037.]

The Authority exercises "public and essential governmental functions . . ." [*H. & S. Code*, sec. 34310.] Its "power . . . is vested in the commissioners in office from time to time." [*H. & S. Code*, sec. 34275.] The Commissioners, therefore, could not lawfully renounce their governmental powers, or delegate them to others, so far as to incapacitate themselves from exercising the power to sue or be sued [*H. & S. Code*, sec. 34311(a)] to the extent needed to defend the instant litigation. [See, *e.g., Hiller v. Los Angeles*, 197 Cal. App. 2d 685, 689, 17 Cal. Rptr. 579, 581; *San Francisco Gas L. Co. v. Dunn*, 62 Cal. 580, 584; *Egan v. San Francisco*, 165 Cal. 576, 583-585, 133 Pac. 294, 296-297.]

[12]The California practice is that "the notice of motion . . . must state . . . the grounds upon which it will be made, and the papers, if any, upon which it is to be based . . . [*Cal. Code of Civil Procedure*, sec. 1010; Cal. Stats., 1907, c. 327, p. 601, sec. 1.] Failure to comply with this requirement is in itself a

(This footnote is continued on the next page)

That Declaration is not in the record that petitioner has caused to be certified to this Court. The motion was denied without opinion.[13] [Clk. Tr., p. 69, lines 29-31.]

Summary of the Argument.

The petitioner, Housing Authority of the City of Los Angeles, a public agency of the State of California, is a public corporation organized and existing under and by virtue of the laws of California. Among other activities it operates a number of low-rent housing projects, of the sort for which PHA is authorized to render financial assistance. The Authority, as the State court held, is fully authorized by State law to enter into contracts, including contracts for the employment of a Secretary and Assistant Secretary to serve as such for a term of years. The respondents were so employed by the Authority under employment contracts however, whose execution was authorized by the Authority's governing board. Before the end of the contract term they were discharged, without, as the trial

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sufficient reason to deny the motion. [*Silva v. Holland,* 74 Cal. 530, 531, 16 Pac. 385; *W. H. Marston Co. v. Kochritz,* 80 Cal. App. 352, 359, 251 Pac. 959, 963.] There is nothing in the record here to show it was not denied for that reason. [See, also, Point IV, *Second, infra.*] So, in view of the silence or ambiguity of the record in that regard, it must be assumed that the denial was based on this adequate and independent state ground; and, therefore, that this Court's jurisdiction has not been made out. [*Stembridge v. Georgia,* 343 U.S. 541, 547-548; *Durley v. Mayo,* 351 U.S. 227, 281, 284-285. And see, also, *Hedgebeth v. North Carolina,* 334 U.S. 806, 807; *Edelman v. California,* 344 U.S. 357, 358-359, 361-362.]

[13]Because the Declaration is not in the record, there is no way for this Court to determine that the motion was not denied for an adequate and independent state ground having to do with the failure to state any grounds or the insufficiency of the showing made in support of the motion. [See, footnote 12, *supra.*] Nor is there any way to determine that any federal question was raised by the motion.

jury specifically found, just or lawful cause. In the within action, maintained in the State courts, and to which only the Authority was a party-defendant, a judgment in favor of respondents was entered, awarding them damages against the Authority for its breach of contract.

In the course of the action the Authority (but not PHA or any of its officials, although they were entitled so to do in the state practice) moved to join the PHA commissioner as an indispensable party. The motion was denied. The State courts based their rulings solely on the State law, primarily, a general statute that, without discrimination against or separate classification of federal agencies or officials, defined who is an indispensable party to an action in the State courts.

From these facts and the record that has been certified to this court it follows that the petition for a writ of certiorari should be denied, because no federal question was raised or decided in the State courts; and, because the record that petitioner has caused to be certified to this Court does not comply with the requirements of *Rev. Rules,* rule 23, subd. 1.

First: The only question with any possible federal implications is the one dealing with the motion to join an alleged indispensable party; and even those implications arise, not from any federal statute or other provision of law that deals with the question of parties to actions in the State courts, but only from the fact that the person sought to be joined was a federal administrative official. All other questions in the case were quite obviously, indeed concededly, solely of State provenance, They dealt with the validity under State law

of the employment contracts; with the justification for the discharge asserted by the Authority; and with the amount of damages to which respondents were entitled. The joinder question, too, is one of State law, since it is concerned only with the question, determined by nondiscriminatory standards of general application, of who is required to be made a party to actions in the State courts. The joinder application was not made by PHA or any of its officials, but by another and nonfederal party—one who is a California corporation and public agency. Its right to compel joinder arose entirely out of the State law. Its application to that end was decided solely under and by application of the State law. No right in that regard was conferred by federal law, and the courts below did not need to consider or rest their decision, and they did not consider or rest their decision, upon federal law. Petitioner, having in itself no federal right to compel a joinder, is, in effect, impermissibly invoking the federal rights, if any, of a third party.

Second: A federal question, it is contended by petitioner, arises from the asserted conflict between the employment contracts and an "annual contributions contract" between PHA and the Authority, which conflict, it is contended, invalidated the employment contracts. No such question was ever made an issue in this case; it was not litigated; it was not decided. It could not have been decided, because the contributions contract, without which there could have been no question at all, was excluded from evidence by the trial court, upon the ground, among others, that there was no issue in the case to which it was material or relevant. That ruling was not excepted to or assigned as

error on the Authority's appeal. Accordingly, the State appellate court, whose judgment it is here sought to review, was not required to and did not pass upon the correctness of the trial court's ruling. So, there is no decision in respect of it before this Court for review.

No provision of the Housing Act of 1937, upon which petitioner relies, furnishes any support for the contention that the employment contracts were invalid. In any event, no such question was raised or decided below.

Third: The petitioner has not presented "with accuracy, brevity and clearness" the matters "essential to a ready and adequate understanding of the points requiring consideration." [*Rev. Rules,* rule 23, subd. 4.] Essential to such an understanding of the entire argument made by petitioner is the contributions contract; but, it is not a part of the certified record. Similarly, the questions now presented are bottomed on the denial of petitioner's joinder motions. But all of the papers upon which the motions were based and made, are not here. A ready and adequate understanding of the points made in that connection cannot be had without the missing papers. The papers that are here disclose no federal question involved in or decided by the rulings on the motions; but they do disclose the strong possibility that there was an adequate and independent State ground for those rulings. This ambiguous state of the record negates this Court's jurisdiction; and, independently of that consideration, requires the sanction of denial of the petition provided in Rule 23, Subd. 4.

ARGUMENT.

I.

The Question Who Is an Indispensable Party to an Action in a State Court That Is Wholly Between Local Parties and That Involves Only Their Rights Under a Contract to Which No Federal Agency or Official Is a Party, Is a Question of State Law, Not Reviewable by This Court.

The question of who are indispensable parties to a litigation in a State court wholly between private or non-federal parties, is, obviously, one that is dependent entirely upon state law, without federal implications of any kind. [*Cf., Herb v. Pitcairn,* 324 U.S. 117, 120; *City of Boston v. Jackson,* 260 U.S. 309, 313.] Decision of such a question, therefore, is not subject to review here, as the State court's determination of the state law is binding upon this Court. [*Williams v. Kaiser,* 323 U.S. 471, 473; *American Ry. Express Co. v. Kentucky,* 273 U.S. 269, 272-273; *Black v. Cutter Laboratories,* 351 U.S. 292, 298; *Smith v. O'Grady,* 312 U.S. 329, 330.] The case here is no different, even though it was a federal official to whom the joinder motion related.

It is not the federal officer in question, who sought to be joined, or who now complains of the failure to join him. It was the petitioner, a non-federal party, who sought to compel the joinder. The non-federal nature of the question determined below, *i.e.,* who is an indispensable party in the state practice, is not changed by the fact that it was a federal officer whom it was sought to have joined. There is no federal statute, none is cited by petitioner, that made the PHA Commis-

sioner an indispensable party to this local lawsuit. No right has been conferred by federal law upon the *petitioner* to have the Commissioner made a party. Whatever right, if any, to such a joinder that the petitioner may have had was entirely the product of the state statute, which alone defined who were indispensable parties. The state court held that this state statute did not encompass one in the Commissioner's posture and relationship to the subject matter of the litigation. [See, *Pet. App.*, 31-33.] That determination of state law is beyond the power of this Court to review.

It may be that if the *Commissioner* had applied and been refused leave to become a party, a federal question might have been precipitated; but if so, it would have been so, because the Commissioner's right to be a party would have stemmed from federal law, *i.e.*, his interest in the subject matter of the litigation, which he had the power to pursue, would have been created by or derived from federal law.[14] The commissioner made no such application. The petitioner has no federal right in itself. Therefore, when it argues that a federal right was denied by the refusal to join the Commissioner, it is in effect invoking the jurisdiction of this Court to vindicate the federal right of a third

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[14]Petitioner attempts to deduce such an interest from the Housing Act of 1937; but the attempt fails of its objective. [See Point II, *infra.*] Be that as it may, any effort by the Commissioner, in the State court action, to litigate his asserted interest in the subject matter would have to be "pursued according to the procedural requirements" of the State, including the State's definition of who must and who may be a party. [*Cf., Hedgebeth v. North Carolina, supra,* 334 U. S. at 807; *Edelman v. California,* 344 U.S. 357, 358.] The question whether the Commissioner was such a party, is not here, however, as the Commissioner did not apply to be admitted into the action; and is anyway, a question of State law.

party. This it is not permitted to do.[15] [See, *Tileston v. Ullman*, 319 U.S. 44, 46; *McCabe v. A.T. & S.F. Ry. Co.*, 235 U.S. 151, 162-164; *Liberty Warehouse Co. v. Burley T.G. Co-op. Assn.*, 276 U.S. 71, 88.]

II.

Invalidity of the Contracts in Suit by Reason of PHA's Contractual and Statutory Relations With the Authority Was Not a Question Raised or Decided Below.

The PHA's interest in the employment contracts here in suit and, therefore, its status as an indispensable party, are contended by petitioner to arise from the United States Housing Act of 1937 [42 U.S.C., chap. 8, beginning with section 1401] and from an "Annual Contributions Contract" assertedly executed

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[15]PHA, or its Commissioner, had they so desired, could themselves have made an application to be joined as an indispensable party or to be permitted to intervene as one having an interest in the matter in litigation. [*Cal. Code of Civil Procedure*, secs. 387, 389.5; *Crofton v. Young*, 48 Cal.App. 2d 452, 454, 456, 119 P.2d 1003, 1005, 1006; *Muller v. Robinson*, 174 Cal. App. 2d 511, 514, 345 P.2d 25, 27.] Denial of such an application would "finally and adversely determine the right of the moving party to proceed in the action . . ." [Witkin, *California Procedure*, vol. 3, p. 2154, sec. 12(b)], and so, the order of denial would be appealable. [*Bowles v. Superior Court*, 44 Cal. 2d 574, 281-582, 283 P. 2d 704, 709-710; *Dollenmayer v. Pryor*, 150 Cal. 1, 3, 87 Pac. 616; *Walsh v. Superior Court*, 92 Cal. App. 454, 456, 268 Pac. 442, 443.]

PHA and its Commissioner, therefore, had a ready and effective method by which to assert and vindicate in the State court, and, if necessary, in review here, any federal right either of them may have had to be a party. They did not pursue or act to vindicate whatever federal right they had. This is not a case where the third party whose rights are invoked would have found it "difficult if not impossible" himself to assert them. [See, *Barrows v. Jackson*, 346 U.S. 249, 255-258.] It follows that there is no reason to permit another to invoke the third party's rights.

So far as petitioner is concerned, *its* right to compel joinder stems entirely from state law. Plainly that right is not a permissible basis of certiorari jurisdiction.

by the Authority and PHA. From these sources, petitioner says, PHA derived the power so to control the operations of the Authority, an official agency of the State of California, as to be entitled to invalidate or disavow contracts into which the Authority, fully authorized by State law to do so, had entered. [See, *e.g., Pet.,* 9, 15-20, 22, 25.] The argument is a specious one.

First: So far as the "Annual Contributions Contract" is concerned, the argument is wholly without support, since the contract was not in evidence below, and could not properly have been brought here. No reference to it was made in the opinion of the State court. No issue arising out of the contributions contract was litigated. To be sure, the validity of the employment contracts was challenged by petitioner on quite a few grounds—but invalidity because of conflict with the contributions contract or because of invalidation by PHA, was not one of those grounds, for the reason, among others, that it was not an issue in the case.

Furthermore, the contract is not in the record, so the argument based on it is without the requisite record support. [See, footnote 20, *infra.*]

Second: The United States Housing Act of 1937 also fails to support the argument. Nowhere in that legislation will there be found any grant of power to PHA to direct or control the operations of a local housing authority or similar state agency, or to approve or annul the local agency's otherwise authorized contracts. The most that can be said is that PHA may exact some limited form of supervision as a provision of the contributions contract it will make. [See, 42

U.S.C., sec. 1410, *passim.*] The specific parts of the Act cited by petitioner [42 U.S.C., secs. 1401, 1410, 1413, 1415, 1421] emphasize the correctness of our assertion, for in these sections there will be found grants of power in many other respects, but none in respect of the matters to which petitioner refers and upon which it relies.[16] [See, *Pet.*, 4, 8, 17, 21-22, 25.] Had it intended

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[16]For convenience, we summarize the provisions of the Housing Act of 1937 upon which petitioner seems to rely:

(a) 42 U.S.C., sec. 1401 declares the policy of the United States to assist the several States and their political subdivisions to alleviate unemployment and to remedy unsafe and insanitary housing conditions. Significantly enough, it is said in this declaration that it is "the policy of the United States to vest in the [local] *public housing agencies* the *maximum* amount of responsibility in the administration of the low-rent housing program. . ." (Italics ours.) That policy hardly comports with the strict and dictatorial control over a housing authority's operations that is subsumed in petitioner's argument.

(b) Section 1410 authorizes PHA to make annual contributions to public housing agencies "to assist in achieving and maintaining the low-rent character of their housing projects . . ."; not, as petitioner says [*Pet.* 20], to pay off their bonded indebtedness. [42 U.S.C., sec. 1410(a).] Accordingly, there are detailed provisions in the statute dealing with such matters as: (1) The basis upon which the contributions may be made [42 U.S.C. sec. 1410(a)]; (2) the limits upon the amount that may be contributed [42 U.S.C., sec. 1410(b)]; (3) the formula for reducing the amount when a housing agency's receipts exceed its expenditures—but, significantly, no *limit* is put upon those *expenditures* nor is any control over them given [42 U.S.C., sec. 1410(c). Italics ours]; (4) the privilege of PHA to require a pledge of the annual contributions as security for any loans obtained by a public housing agency—but, there is no evidence here that PHA required the contributions made to petitioner to be so pledged. [42 U.S.C., sec. 1410(f).]

(c) 42 U.S.C., sec. 1413(a), gives PHA the power to foreclose on any property, commence actions to protect any rights conferred upon it by law or contract, and acquire or take possession of any project it previously owned or in connection with which it made a loan, annual contribution or capital grant. There is no evidence in this case that PHA had any forecloseable or other right against the Authority's property, whether conferred by law or contract. The right to take possession referred to in this section is one to be exercised pursuant to 42 U.S.C., sec. 1421a.

to confer any powers other than those it expressly mentioned, "Congress doubtless would have said so." [*Cf., United States v. Borden Co.,* 308 U.S. 188, 201.]

Third: If PHA had any right, whatever its source, to object to or annul the employment contracts or to prevent payment of the compensation provided for in them, the right was waived by PHA's concurrence in and failure to except to the contracts and expenditures in question. It had full knowledge of them through its annual audits and triennial review of the Authority's operations. [See, Counter-Statement of the Case, sec. 3, *supra, passim;* and, in particular, footnote 7, *supra.*]

III.

Except for Joinder of an Alleged Indispensable Party, None of the "Questions Presented for Review" Was Raised or Decided Below.

Except for the question relating to failure to join the PHA commissioner as an indispensable party, none of the questions "presented for review" [*Pet.,* 3] was raised or decided below. There is, therefore, nothing in respect of them for this Court to review.

First: We have already noted [see footnotes 8 and 9, and accompanying text, *supra*] that none of these questions was embraced within the issues that were to

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That section specifies what may be included in an annual contributions contract, including a provision for delivery of possession in the event of a substantial default—but, there is no such contract in evidence here.

(d) 42 U.S.C., sec. 1415(3) gives PHA the right to reduce or terminate annual contributions in the event of a substantial breach of the condition, to be embodied in a contributions contract, for maintenance of the low-rent character of the housing project involved. There is no contributions contract in evidence here; nor is there evidence that there was any such breach.

be tried. By the same token, none of them was decided. The absence of any such decision in the trial court may be readily ascertained from the Findings of Fact and Conclusions of Law made in respect of the issues submitted to the trial court sitting without a jury [Supp. Clk. Tr., pp. 397-407]; and, from the instructions given the jury, on the issues submitted to them. [Supp. Clk. Tr., pp. 439-475.] The questions thus entertained and decided, it will be seen, were concerned entirely with either, the validity of the employment contracts upon grounds having nothing to do with PHA or its statutory or contractual relationship with the Authority; or with the discharge, its asserted justification, and the damages recoverable on account of it.

None of the questions now presented was raised or decided on the appeal.[17] [See, *Pet. App.* 1-55.] Except

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[17]These were the only matters discussed and decided in the opinion of the Court of Appeal:

(1) The employment contracts were not void for the reason that they covered a period extending beyond the terms of office of members of the Authority's commission. [*Pet. App.*, 8-12.]

(2) The contracts were not invalid as delegating non-delegable duties to the employees. [*Pet. App.*, 12-14.]

(3) The jury's special verdicts that the discharge of respondents was without just or lawful cause, were supported by evidence showing no justification for the discharge. [*Pet. App.*, 14-27.]

(4) The contracts were not invalid under the limitation upon the length of terms of office imposed by section 16 of article XX of the State Constitution. [*Pet. App.*, 27-31.]

(5) PHA was not an indispensable party, nor was it a conditionally necessary party, within the meaning of section 389 of the California Code of Civil Procedure. [*Pet. App.*, 31-33.]

(6) The Authority's plan of retirement benefits was not invalid as a gift of public funds. [*Pet. App.*, 31-36.]

(7) Rescission of the old and execution of new employment contracts was not a gift of public funds; and the con-

for the question about joinder of an indispensable party, all of the questions that petitioner now presents depend upon the premise that the contributions contract and the cited provisions of the Housing Act of 1937 made the employment contracts invalid and gave PHA the right to disavow or annul them. [See, *Pet.* 3, 15-18.] The short answer to this entire presentation is that the questions were not raised or decided below; nothing in the judgment, sought to be reviewed here, was based upon or arose out of those questions. [See, footnotes 9 and 17, *supra.* See, also, Point II, *supra.*]

Second: The judgment is not one against the United States. [*Pet.*, 18-19, 21-22.] Neither the United States nor any United States officer, agency or instrumentality, is a party to the action. The mere fact that possession of the Authority's housing projects, *i.e.*, its real property, may have been turned over to a federal administrative official, does not change the fact that the only party-defendant, the only judgment debtor, is a *State agency,* which is a body corporate and politic and, therefore, a separate entity or juridical person. [See, footnote 11, *supra.*] PHA's possession of the real property, even assuming it to be a lawful possession [see, footnote 11, *supra*], will not be

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tracts were supported by a consideration. [*Pet. App.*, 37-39.]

(8) The contracts did not provide the employees with an automobile for personal use, but for business use, and, so, did not violate the State's statutory proscription of personal use of public-owned cars. [*Pet. App.*, 39.]

(9) A jury instruction relating to notice to a commissioner being notice to the Authority, was not erroneous. [*Pet. App.*, 39-42.]

(10 The judgment against respondent Holtzendorff and in the Authority's favor on the latter's cross-complaint was not erroneous. [*Pet. App.* 42-55.]

disturbed by this judgment. [*Cf., Land v. Dollar,* 330 U.S. 731, 738.] Under the State law, the Authority's real property is exempt from execution. [*H. & S. Code,* sec. 34217.[18]]

Third: The contention that the State court was without jurisdiction because jurisdiction in suits against the United States is vested in a United District Court or Court of Claims [*Pet.* 3, 21-22], even if it were made below—which it was not [see, footnotes 9 and 17, *supra*]—is quite without merit. The cited statutes no doubt confer original jurisdiction upon the courts mentioned. Neither statute, however, purports to make that jurisdiction exclusive of the jurisdiction, such as in contract litigation, which the State courts have traditionally exercised. In such a case, the statutory federal jurisdiction is not exclusive, as has been decided, in cases such as those next cited, with respect to virtually identical statutory and constitutional provisions.[19] ". . . The conferring of jurisdiction in actions at law upon the appropriate District Courts of the United States is not, in and of itself, a deprivation of an existing jurisdiction both at law and in equity in State courts. . . ." [*Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 503-506. To the same effect: *Ohio ex rel. Popovici v. Agler,* 280 U.S. 379, 383-384.]

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[18]Section 34217 so far as material here, is as follows:

"Execution or other judicial process shall not issue against the real property of an authority nor shall any judgment against an authority be a charge or lien upon its real property. . ."

[19]No question arises of any consent by the United States to be sued. It has not been sued. [See, Point III, *Second, supra.*] Indeed, it is the petitioner who, inconsistently enough, insists that it be sued by the joinder of the PHA commissioner. If it had been sued, it would have been for it, not a third party, to invoke its immunity.

IV.

The Record Presented by Petitioner so Far Fails to Include Matters Necessary to a Ready and Adequate Understanding of the Points Made, as to Justify Denial of the Petition.

It is no doubt the duty of a petitioner "to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration . . ." [*Rev. Rules,* rule 23, subd. 4.] The petitioner here has so far failed to render performance of that duty as to justify imposition of the sanction specified in the rule—denial of its petition.

First: The principal point made by petitioner, the one upon virtually all else in the petition is grounded, is that PHA by virtue of a "contributions contract" with the Authority was invested with the right to control the latter's contracts and to annul them, which right it exercised because, allegedly, the employment contracts were in violation of the contributions contract. [See, *e.g., Pet.* 9, 15-20, 22, 26.] Obviously, what is "essential to a ready and adequate understanding" of that point is the "contributions contract". It is not here; it was never received in evidence; and no question arising out of it was litigated or decided. Thus, it is not merely that the certified record here does not present what is essential to an understanding of the point.[20] It is also, that it is shown that there is

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[20]This Court, of course, "must look only to the certified record in deciding questions presented. . ." [*Lawn v. United States,* 355 U.S. 339, 354. To the same effect: *Ciucci v. Illinois,* 356 U. S. 571, 573; *McClellan v. Carland,* 217 U.S. 268, 282-283.]

In this connection it may be noted that in requiring a petitioner to file "a transcript of the record in the case" [*Rev. Rules,* rule

(This footnote is continued on the next page)

no decision, involving or based on that point, to be reviewed. So it is that petitioner's argument, premised as it is on the asserted conflict between the employment contracts and a contributions contract, is left unrooted in the facts of the case or in any decision of the court below.[21]

Second: The only ruling below that in any way involved any of the questions that petitioner now presents, was the ruling that the Commissioner, not being indispensable within the meaning of California statute on the subject, did not have to be joined. Obviously essential to a ready and adequate understanding of that point, and to a determination whether the ruling was based on a federal ground, are the motion papers. They are here only in part. [Supp. Clk. Tr. pp. 1-12; pp. 369-370.] The most important part, the factual showing, upon which the petitioner now bases its conten-

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21, subd. 1], the interpretative inference is that the rule calls for the entire record, not just so much or so little of it as the petitioner may arbitrarily or whimsically determine. That is shown by the absence in the rule of any provision for designation and counter-designation of the parts of the record to be certified, whereas in the comparable case of an appeal there is such a provision. [*Rev. Rules,* rule 10, subd. 2(b); rule 12, subd. 1.]

[21]It is permissible for us to say that among the papers filed in support of the second motion to join Commissioner McGuire there was a declaration of Jack E. Hildreth, as the notice of motion names it among the papers upon which the motion would be based. [Supp. Clk. Tr., p. 370, lines 1-4.] Even that declaration is not here; so it cannot be ascertained if a copy of a "contributions contract" was attached to it. It would make no difference if it had been. The declaration, as well as the other motion papers, was before the court only for purposes of the motion; not as any part of the evidence going to the merits of the action. The significant facts in the present context are that the contract was not received in evidence at the trial on the merits; no question arising out of it, particularly no question of the sort now being urged, by petitioner, was litigated or decided; and the judgment sought to be reviewed is not based upon it. [See, Point III, *supra.*]

tion that the Commissioner had the requisite interest, *i.e.*, the contributions contract, is not here. Indeed, there is no showing that it was even before the court below, even in connection with either of the motions, to join the Commissioner, as there is no reference to it in such of the motion papers as are here. For all that the record before this Court shows, the motions may have been properly denied upon some such adequate and independent state ground as a factually insufficient showing that the Commissioner fitted the statutory definition of an indispensable party. [See, footnote 12, *supra.*]

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HERMAN F. SELVIN,
CHARLES E. JONES,
Attorneys for Respondents.

APPENDIX.

California Code of Civil Procedure, Section 389 [Cal. Stats., 1957, c. 1948, p. 2824.]

"A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties or would seriously prejudice any party, before the court or if his interest would be inequitably affected or jeopardized by a judgment rendered between the parties.

A person who is not an indispensable party but whose joinder would enable the court to determine additional causes of action arising out of the transaction or occurrence involved in the action is a conditionally necessary party.

When it appears that an indispensable party has not been joined, the court shall order the party asserting the cause of action to which he is indispensable to bring him in. If he is not then brought in, the court shall dismiss without prejudice all causes of action as to which such party is indispensable and may, in addition, dismiss without prejudice any cause of action asserted by a party whose failure to comply with the court's order is wilful or negligent.

When it appears that a conditionally necessary party has not been joined, the court shall order the party asserting the cause of action to which he is conditionally necessary to bring him in if he is subject to the jurisdiction of the court, if he can be brought in without undue delay, and if his joinder will not cause undue complexity or delay in the proceedings. If he is not then brought in, the court may dismiss without prejudice any cause of action asserted by a party

whose failure to comply with the court's order is wilful or negligent.

Whenever a court makes an order that a person be brought into an action, the court may order amended or supplemental pleadings or a cross-complaint filed and summons thereon issued and served.

If, after additional conditionally necessary parties have been brought in pursuant to this section, the court finds that the trial will be unduly complicated or delayed because of the number of parties or causes of action involved, the court may order separate trials as to such parties or make such other order as may be just."

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IN THE

Supreme Court of the United States

October Term, 1967

No. 763

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, a body corporate and politic,

Petitioner,

vs.

HOWARD L. HOLTZENDORFF and BARBARA ROSIEN,

Respondents.

Reply Brief to Respondents' Brief in Opposition to Petition for a Writ of Certiorari.

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Following the Filing of the Petition for a Writ of Certiorari and designating the record in this action, Respondents procured a writ of execution from the trial court and in an attempt to enforce the judgment rendered, had a levy of execution made on funds received from low rent income. The depositary, Union Bank a California banking corporation thereafter filed an interpleader action to determine the ownership of the funds held, a copy of this complaint is attached as Appendix "A". The respondents filed their answer and claim to the funds a copy of which is attached as Appendix "B" and the Department of Housing and

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Urban Development and their designated officials filed their answer and cross claim a copy of which is set forth as Appendix "C".

These subsequent events more fully demonstrate the clear and impelling reasons why the writ should be granted.

ARGUMENT.

I.

The Question Presented Is One of a Federal Nature and Reviewable by This Court.

Respondents by their brief in opposition to this Petition for a Writ of Certiorari clearly indicate the fear that they have had from the inception of this litigation. Had the Public Housing Administration been joined as a party to the action, its rights and interest would preclude recovery by Respondents by reason of the Supremacy Clause of the United States Constitution, Federal Statute and Contract. Their success in leading the State Courts into erroneously concluding that the Public Housing Administration was not an indispensable party, that the State Courts need not apply applicable Federal Statues, nor consider stipulated interests of the Public Housing Administration does not preclude this Court from granting the requested Writ but offers the vary basis for doing so.

Petitioner under the heading "Reasons for Granting the Writ",[1]

The Opinion of the California Court of Appeal has placed Petitioner's present Board of Commissioners in

[1]Petition for a Writ of Certiorari, pages 15-16.

the untenable position of being charged with the payment of a judgment out of low rent housing authority funds over which they do not have control. The expenditure of these funds is subject to and under the control of the Public Housing Administration which has declared that the contracts in question were void and unenforceable and that no low rent funds could be used to discharge any such contractual obligations.

The California Court by not recognizing the interests of the Public Housing Administration and making it a party to this action, has created this impossible situation.

Subsequent to the filing of this Petition, the Department of Housing and Urban Development, Robert C. Weaver and Robert F. Johnson, officials of that Federal Agency, filed answers to the First Amended Complaint in Interpleader after the action had been removed to the U.S. District Court. There, the complaint was filed by the Union Bank, a California banking corporation, to determine rights and ownership of funds held by it after the Respondents attempted to enforce the judgment, subject of this proceeding, from funds in the Federally controlled bank and derived from receipts from the Federally assisted low rent housing projects, formerly operated by Petitioner. The First Amended Complaint in Interpleader, Respondents' Answer thereto and the Answer and Cross Claim of the Department of Housing and Urban Development and its officials, Robert C. Weaver and Robert F. Johnson, are reprinted as an appendix to this reply.

The issues joined in this companion litigation clearly substantiate the error made by the California Court of Appeal in holding that the PHA "had no justiciable interest of any kind" . . . " 'nor', any interest at all, let alone one that would be jeopardized by a judgment 'between the parties' ",[2] and the reason for granting the Writ.

The record before this Court fully discloses the duty imposed upon the Department of Housing and Urban Development and its predecessors to protect the lowest income groups from having local officials raid funds which have a direct bearing upon the amount of the rent to be charged them to maintain the low rent housing projects. When, as here, the Federal interest is brought to the attention of the State Courts, the failure to join the Federal Agency leaves such courts without jurisdiction to try the controversy. The issue raised herein is not one of abject theory but presents a situation where the Federal Agency was actually in possession, control and had paramount authority over the Local Authority prior to the commencement of the action.

The position taken by the Department of Housing and Urban Development in its Answer, aptly demonstrates the impossible situation which now exists as a result of the State Court's erroneous decision as set forth in the Petition for Writ.[3] If the present

[2]Decision of the California Court of Appeal, Appendix "A" of Petition for a Writ of Certiorari, pages 31 and 32.

[3]At page 16 of the Petition for a Writ of Certiorari, Petitioner posed the very problem that now exists stating:

"Enforcement of the California Court of Appeal decision in the present case necessarily conflicts with Federal statute and contract. Petitioner, acting through its Commissioners on the one hand, are required by this judgment to pay the

judgment is allowed to become final Petitioner on the one hand will be charged with the responsibility of satisfying a judgment rendered against it by the State Court and quite probably restrained from satisfying it by a Federal decision as contrary to Federal statute and authority.

II.

The Record Includes All Matters Necessary to a Ready and Adequate Understanding to the Points Made.

Respondents assert that because the court excluded the annual contributions contract with the Public Housing Authority from the evidence Petitioner is precluded from asserting its provisions in considering this Petition.

As fully set forth in the Petition this ruling of the State Courts is the very point relied upon by Petitioner. That contract was before both the trial court and the California Court of Appeal. The pertinent parts were quoted and set forth in the briefs of Petitioner and Respondents and are now in the record of this court. It is further noted that the subject matter and issues raised were the subject of Respondents' stipulation wherein the Federal interest was set forth. Respondents seek to avoid this stipulation upon the ground that the contract was excluded by the trial Judge which they should not be entitled to do.

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same through the use of Federally audited, controlled and possessed funds. To do so would require the Commissioners to act contrary to the determination of the Commissioner of the Public Housing Administration, its Federal Annual Contributions Contract, ad the use of funds over which they do not now or have ever had the ultimate right of control."

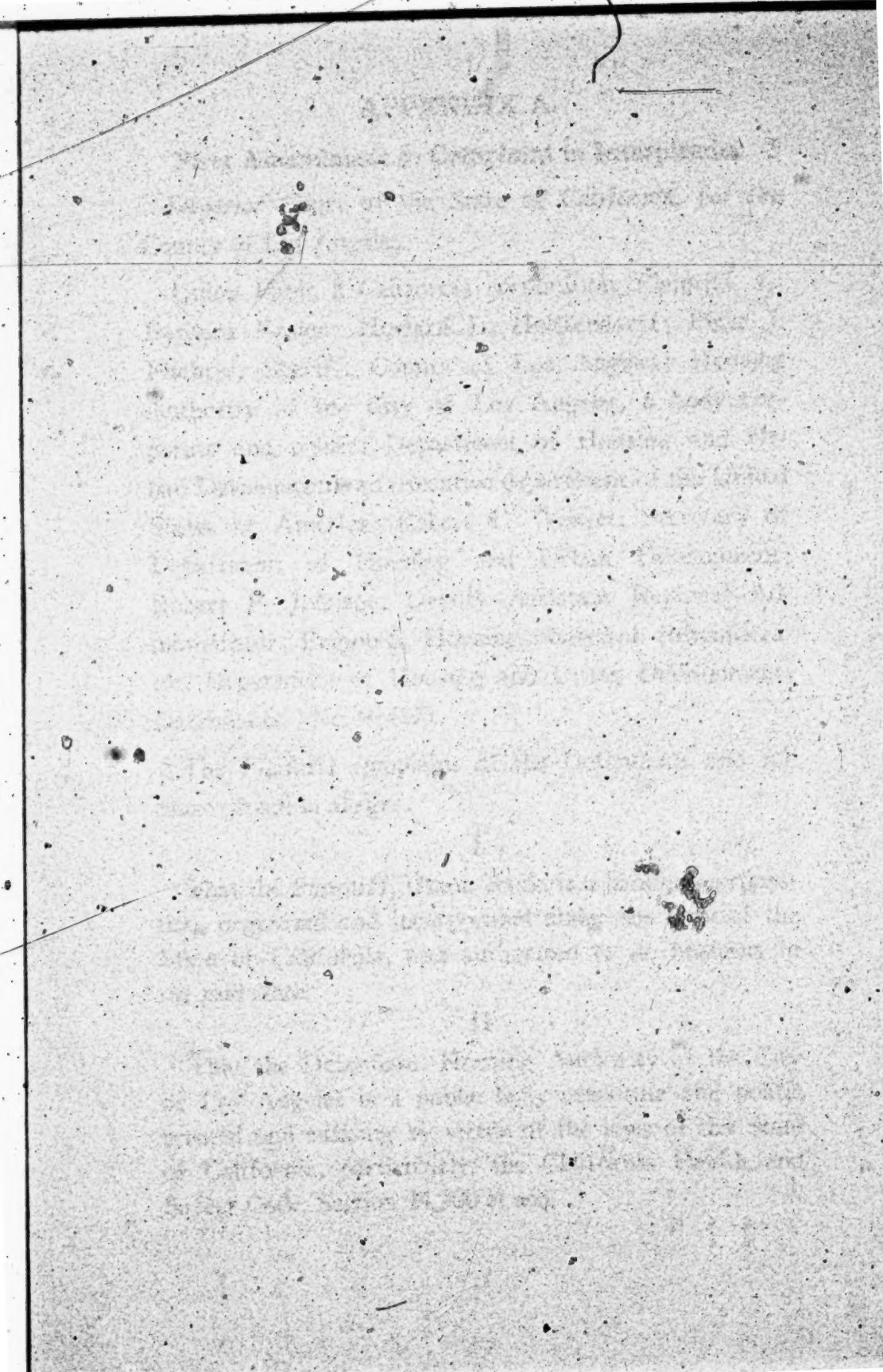
Further, as set out in the Petition the question of the joinder of the Public Housing Administration was a jurisdictional one that could be raised the first time on appeal. The quoted parts of the contract in the briefs made part of this record are sufficient to sustain the "Federal Interest" even without resort to Stipulation covering the subject.

It is respectfully submitted that the failure of the Federal Agency to seek to enter the litigation on the State Court level is immaterial to the issues presented by this Petition.

Respectfully submitted,

JACK E. HILDRETH and
RICHARD R. ROGAN,
Attorneys for Defendant, Appellant, Cross-Complainant, Respondent and Petitioner.

Of Counsel:
HARVEY A. SNIDERMAN,



APPENDIX A.

First Amendment to Complaint in Interpleader.

Superior Court of the State of California, for the County of Los Angeles.

Union Bank, a California corporation, Plaintiff, vs. Barbara Rosien; Howard L. Holtzendorff; Peter J. Pitchess, Sheriff, County of Los Angeles; Housing Authority of the City of Los Angeles, a body corporate and politic; Department of Housing and Urban Development, an executive department of the United States of America; Robert C. Weaver, Secretary of Department of Housing and Urban Development; Robert F. Johnson, Deputy Assistant Regional Administrator, Region-6, Housing Assistant Administrator, Department of Housing and Urban Development; Defendants. No. 914171.

The Plaintiff complains of the Defendants and for cause of action alleges:

I

That the Plaintiff, Union Bank, is a banking corporation, organized and incorporated under the laws of the State of California, and authorized to do business in the said state.

II

That the Defendant, Housing Authority of the City of Los Angeles is a public body corporate and politic created and existing by virtue of the laws of the State of California, particularly, the California Health and Safety Code, Section 34,200 et seq.

III

That the Defendant, Department of Housing and Urban Development is an executive department of the United States of America, created and existing by virtue of the laws of the United States, particularly, United States Code, Title 5, Section 624A, which department is the successor to the Public Housing Administration.

IV

That the Defendant Robert C. Weaver, is sued herein in his capacity as Secretary and Head of the Department of Housing and Urban Development.

V

The Defendant, Robert F. Johnson, is sued herein in his capacity as Deputy Assistant Regional Administrator of Region-6, Housing Assistant Administrator, of the Department of Housing and Urban Development.

VI

That prior to the making of the claims hereinafter mentioned, Defendant, Housing Authority of the City of Los Angeles, entered into a General Depositary Agreement with Plaintiff and the Public Housing Administration which functions, powers and duties are now vested in the Secretary of the Department of Housing and Urban Development whereby a commercial checking account was opened and carried with Plaintiff now and during all times mentioned herein; and pursuant to said account, Plaintiff was and is indebted to the Housing Authority of the City of Los Angeles for a certain balance upon said open checking account.

VII

That Plaintiff was served on or about July 7, 1967, upon orders and instructions of Peter J. Pitchess, Sheriff of the County of Los Angeles, with Notice of Garnishment and attached thereto a copy of a Writ of Execution, which was issued by this court in an action entitled *Howard L. Holtzendorff and Barbara Rosien vs. Housing Authority of the City of Los Angeles,* a body corporate and politic, Superior Court Case Number 817285; the amount demended by the Sheriff of Los Angeles County and necessary to satisfy the Writ of Execution on behalf of Plaintiffs Howard L. Holtzendorff and Barbara Rosien is ONE HUNDRED SEVENTY-FIVE THOUSAND THREE HUNDRED TWELVE DOLLARS AND SEVENTY-SIX CENTS ($175,312.76) plus interest of THIRTY-THREE DOLLARS AND SIXTY-THREE CENTS ($33.63) per day until paid; the Sheriff of Los Angeles County pursuant to said writ has demanded that all property levied upon be delivered to Peter J. Pitchess, Sheriff, Civil Division, Los Angeles County Court House, Los Angeles, California 90012.

VIII

That Plaintiff was served on or about August 8, 1967, upon orders and instructions of Peter J. Pitchess, Sheriff of the County of Los Angeles, with Notice of Garnishment and attached thereto a copy of a Writ of Execution, which was issued by this court in an action entitled *Howard L. Holtzendorff and Barbara Rosien vs. Housing Authority of the City of Los Angeles,* a body corporate and politic, Superior Court Case Number 817285; the amount demanded by the Sheriff of Los Angeles County and necessary to satisfy

the Writ of Execution on behalf of Plaintiffs Howard L. Holtzendorff and Barbara Rosien in addition to the amount necessary to satisfy the writ referred to in paragraph VII above is THREE THOUSAND FIVE HUNDRED SIXTY DOLLARS AND THIRTY-FIVE CENTS ($3,560.35) plus interest of SIXTY-NINE CENTS ($.69) per day until paid; the Sheriff of Los Angeles County pursuant to said writ has demanded that all property levied upon be delivered to Peter J. Pitchess, Sheriff, Civil Division, Los Angeles County Court House, Los Angeles, California 90012.

IX

That pursuant to said Writs of Execution and upon instructions of Sheriff Peter J. Pitchess, Plaintiff did on the 7th day of July, 1967, and thereafter on the 8th day of August, 1967, set aside sufficient funds from said open checking account to satisfy the Writs of Execution.

X

Title and right of possession to these funds set aside by the Plaintiff are now claimed by the Defendants, Robert C. Weaver, Robert F. Johnson, and the Department of Housing and Urban Development as successor to the Public Housing Administration on behalf of the United States of America; that pursuant to the terms of the above-mentioned General Depositary Agreement, no withdrawals shall be made from the above-mentioned open checking account without express written authority from the Department of Housing and Urban Development through Robert F. Johnson, Deputy Assistant Regional Administrator.

XI

That Plaintiff has no claim upon the monies set aside for the purpose of satisfying the Writs of Execution, and is ready and willing to and hereby offers to deposit the same in court, or to deliver the same to such person as the court shall direct.

XII

That Plaintiff is wholly unable to decide and determine the respective rights of the Defendants in said amount set aside.

XIII

That Plaintiff is indifferent as to the rights between the various Defendants; that this action is brought without collusion with any Defendant; and that Plaintiff is ready and willing to and hereby offers to deposit the same in court, or deliver the same to such person as the court shall direct.

WHEREFORE THE PLAINTIFF PRAYS JUDGMENT:

1. That the Defendants be restrained from taking any proceeding against the Plaintiff in relation thereto.

2. That said Defendants be required to interplead together and among themselves concerning their respective claims to the said money.

3. That some person be authorized to receive the said money pending such litigation.

4. That upon delivering the same to such receiver the Plaintiff be discharged from all liability to either of the Defendants in relation thereto.

5. And that the Plaintiff's costs of suit be paid out of the same.

Louis Zankich and Lewis W. Sanders
Attorneys for Plaintiff, Union Bank
By Louis Zankich

APPENDIX B.

Answer to First Amended Complaint in Interpleader and Counterclaim of Defendants Barbara Rosien and Howard L. Holtzendorff.

United States District Court, Central District of California.

Union Bank, a California Corporation, Plaintiff, vs Barbara Rosien; Howard L. Holtzendorff; Peter Pitchess, Sheriff, County of Los Angeles; Housing Authority of the City of Los Angeles, A body corporate and politic; Department of Housing and Urban Development, an executive department of the United States of America; Robert C. Weaver, Secretary of Department of Housing and Urban Development; Robert F. Johnson, Deputy Assistant Regional Administrator, Region 6, Housing Assistant Administrator, Department of Housing and Urban Development, Defendants. Civil Action No. 67-1332-R.

The defendants, Barbara Rosien and Howard L. Holtzendorff, answer the First Amended Complaint in Interpleader as follows:

I

Defendants admit the allegations contained in Paragraphs I, II, III, IV, V, VII, VIII, IX, XI, XII and XIII of the First Amended Complaint in Interpleader on file herein.

II

Answering Paragraph VI of the First Amended Complaint in Interpleader, defendants admit that, plaintiff was and is indebted to the Housing Authority of the City of Los Angeles for a certain balance upon said open checking account. Except as herein expressly ad-

mitted, answering defendants are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in said Paragraph.

III

Defendants are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph X of the First Amended Complaint in Interpleader.

COUNTERCLAIM OF BARBARA ROSIEN AND HOWARD L. HOLTZENDORFF

I

On or about November 10, 1964, in an action then pending in the Superior Court of the State of California, County of Los Angeles, Barbara Rosien and Howard L. Holtzendorff, Plaintiffs; versus Housing Authority of the City of Los Angeles, Defendant, a judgment was duly entered awarding the sum of Eighty Five Thousand Five Hundred and Thirty Eight Dollars ($85,538.00) to counterclaimant, Barbara Rosien and One Hundred and Twenty Two Thousand Six Hundred and Sixty One Dollars ($122,661.00) to counterclaimant Howard L. Holtzendorff against defendant, Housing Authority of the City of Los Angeles. A judgment was entered on or about February 5, 1965 in the same action on a cross-complaint filed by defendant Housing Authority of the City of Los Angeles against counter-claimant, Howard L. Holtzendorff, only, awarding the sum of Thirty Eight Thousand Four Hundred and Forty Two Dollars and Sixteen Cents ($38,442.16) to defendant, Housing Authority of the City of Los Angeles.

II

On or about July 6 and July 25, 1967, the counter-claimants, Barbara Rosien and Howard L. Holtzendorff, after allowing for the sum awarded defendant, Housing Authority of the City of Los Angeles on the cross-complaint, duly caused to be issued by the Superior Court of the State of California, County of Los Angeles, Writs of Execution in the amounts of One Hundred and Seventy Five Thousand Three Hundred and Twelve Dollars and Seventy Six Cents ($175,312.76) plus interest of Thirty Three Dollars and Sixty Three Cents ($33.63) per day until paid, and Three Thousand Five Hundred and Sixty Dollars and Thirty Five Cents ($3,560.35) plus interest of Three Dollars and Sixty Nine Cents ($3.69) per day until paid.

III

On or about July 8, 1967 and August 8, 1967, pursuant to said Writs of Execution, defendant Sheriff Peter J. Pitchess, duly levied upon plaintiff, Union Bank, a Writ of Execution duly issued by said Superior Court, which Writ ordered and commanded said Sheriff to satisfy the judgments with interest and costs as provided by law. Union Bank did set aside sufficient funds to satisfy the Writs of Execution, from a commercial checking account which was opened and carried with said Union Bank by defendant, Housing Authority of the City of Los Angeles.

IV

By reason of said Judgments, Writs of Execution and Notices of Garnishment, said counter-claimants are entitled to said sums here interpleaded and none of the other defendants herein have any right, title or interest in or to said sums.

WHEREFORE, defendants and counter-claimants, Barbara Rosien and Howard L. Holtzendorff demand:

1. That this action be dismissed as to defendants and counter-claimants, Barbara Rosien and Howard L. Holtzendorff.

2. That it be adjudicated that defendants and counter-claimants, Barbara Rosien and Howard L. Holtzendorff, are entitled to possession of all of the funds referred to in the First Amended Complaint in Interpleader herein and that defendants, Housing Authority of the City of Los Angeles and the Department of Housing and Urban Development have no interest therein.

3. That the claims of all other parties in this proceeding be denied.

4. That these defendants and counter-claimants be given such other and further relief as may be equitable and proper in the premises.

5. That these defendants and counter-claimants recover their costs herein.

Kaplan, Livingston, Goodwin,
Berkowitz & Selvin

/s/ By Charles E. Jones
Charles E. Jones
Attorneys for Defendants and
Counter-Claimants, Barbara
Rosien and Howard L. Holtzendorff

APPENDIX C.

Answer and Claim of Defendants Department of Housing and Urban Development. Robert C. Weaver and Robert F. Johnson to First Amendment to Complaint in Interpleader, Counterclaim and Cross-Claim Against Barbara Rosien, Howard L. Holtzendorff and Housing Authority of the City of Los Angeles.

United States District Court, Central District of California.

Union Bank, a California corporation, Plaintiff, v. Barbara Rosien, et al., Defendants. Civil No. 67-1332-R.

Filed Dec. 27, 1967.

I. ANSWER

Defendants Department of Housing and Urban Development (hereinafter referred to as HUD), Robert C. Weaver and Robert F. Johnson, by their undersigned attorneys, in answer to plaintiff's first amendment to complaint in interpleader, hereby admit, deny, and allege as follows:

1. Defendants admit the allegations contained in Paragraph I of the amended complaint.

2. Defendants admit the allegations contained in Paragraph II of the amended complaint but, in the interest of clarity further state that the low-rent housing projects of defendant Housing Authority of the City of Los Angeles, and all rights, duties, functions, and property acquired, held, or used pursuant to the United States Housing Act of 1937, 42 U.S.C. 1401, *et seq.*, are in the possession of the United States of America, Department of Housing and Urban Development, Rob-

ert C. Weaver, Secretary, by his designee, Robert P. Johnson and are properties and rights, powers, duties, and functions of the United States of America.

3. Defendants admit the allegations contained in Paragraph III of the amended complaint, except that portion which reads: "which department is the successor to the Public Housing Administration." Defendants allege instead that the Public Housing Administration was abolished and all functions, powers, and duties of said Public Housing Administration, its head and their offices and officers, were vested in the Secretary of the Department of Housing and Urban Development by Public Law 89-174, 79 Stat. 667, 3 U.S.C. 624 *et seq.*

4. The allegations contained in Paragraph IV of the amended complaint are conclusions of law to which no answer is required, but if an answer is deemed to be required the allegations of that paragraph are admitted.

5. The allegations contained in Paragraph V of the amended complaint are conclusions of law to which no answer is required, but if an answer is deemed to be required the allegations of that paragraph are denied.

6. Defendants admit the allegations contained in Paragraph VI of the amended complaint up to the semicolon in line 28 and deny the remaining allegations contained in that paragraph.

7. Defendants admit the allegations contained in Paragraph VII of the amended complaint.

8. Defendants admit the allegations contained in Paragraph VIII of the amended complaint.

9. Defendants admit the allegations contained in Paragraph IX of the amended complaint.

10. Defendants admit the allegations contained in Paragraph X of the amended complaint except that portion which reads "Department of Housing and Urban Development through Robert F. Johnson, Deputy Assistant Regional Administrator"; defendants allege instead that no written withdrawals shall be made from the above-mentioned open checking account without express written authority from the United States of America, Department of Housing and Urban Development, Robert C. Weaver, Secretary, by Robert F. Johnson, designee and delegee of said secretary.

11. Defendants admit the allegations contained in Paragraph XI of the amended complaint.

12 and 13. Defendants deny the allegations contained in paragraphs 12 and 13 of the amended complaint and alleges instead that plaintiff Union Bank is aware of its obligation under its deposit agreement to pay the funds to defendant Weaver through Johnson.

Defendants HUD, Weaver and Johnson deny each and every allegation not hereinbefore expressly admitted.

WHEREFORE, defendants HUD, Weaver and Johnson pray that:

1. The court grant judgment declaring that they are entitled to the bank deposits subject to this garnishment proceeding;

2. That this court issue an injunction restraining defendants Holtzendorff and Rosien from enforcing or attempting to enforce the judgment in Superior Court Case No. 817285 by writ of garnishment against the funds now held by plaintiff Union Bank;

3. That the court grant such further relief as may be just and proper.

II. CLAIM OF DEFENDANTS HUD, WEAVER AND JOHNSON TO FUNDS HELD BY PLAINTIFF UNION BANK.

By way of claim, the defendant Department of Housing and Urban Development, Robert C. Weaver, Secretary of the Department of Housing and Urban Development, and Robert F. Johnson, delegee and designee of said Secretary in possession of the federally assigned projects of the Housing Authority of the City of Los Angeles under the United States Housing Act of 1937 allege:

1. The United States of America, Department of Housing and Urban Development, Robert C. Weaver, Secretary, (hereinafter referred to as "HUD"), administers the United States Housing Act of 1937, 42 U.S.C. 1401 *et seq.* (hereinafter referred to as USHAct). Pursuant to the requirements contained in said Act, HUD enters into contracts (denominated annual contributions contracts) with state public bodies of low-rent housing projects to house families and the elderly of low income who are unable to obtain decent, safe, and sanitary housing at rents they can afford.

2. The United States of America, Department of Housing and Urban Development, Robert C. Weaver, Secretary, has entered into two such annual contributions contracts, denominated Contracts SF 95 and SF 113 with the Housing Authority of the City of Los Angeles for the development of some 19 low-rent housing projects having an aggregate capital cost of approximately $63,500,000, pursuant to the United States

Housing Act of 1937. The United States of America, Department of Housing and Urban Development, Robert C. Weaver, Secretary, has entered into two other contracts denominated Administration Contracts for the operation for low-rent housing purposes of Projects CAL-4-23 and CAL-4-24. The contracts are annexed hereto and made a part hereof as Exhibit 1.

3. On April 19, 1961, the Housing Authority of the City of Los Angeles entered into a contract with Howard L. Holtzendorff for employment. This contract by its terms divested the housing authority of power to administer the housing projects and vested such power in Howard L. Holtzendorff until December 31, 1967.

4. On April 19, 1961, the Housing Authority of the City of Los Angeles entered into a contract with Barbara Rosien for employment. This contract by its terms divested the housing authority of the power to administer the housing projects and to vest such power in Barbara Rosien in the absence of Howard L. Holtzendorff until December 31, 1967.

5. Early in December 1962, representatives of the Housing Authority of the City of Los Angeles verbally informed HUD of the provisions of the employment contracts of April 19, 1961, and forwarded copies of the contracts to HUD on December 6, 1962.

6. The USHAct of 1937 and the annual contributions contracts thereunder between HUD and the Housing Authority of the City of Los Angeles require that the housing authority have power to administer the housing projects in such manner as to promote serviceability, efficiency, economy, and stability. Any di-

vestiture of this power by action of the housing authority constitutes a breach and default under said annual contributions contracts. The divestiture contained in the above employment contracts was *ulta vires* of the USHAct of 1937, and null and void. HUD made determinations to this effect and so advised the housing authority. HUD also advised the housing authority that it would not permit any expenditures of monies derived from operation of the federally assisted low-rent housing projects for payment to defendants Holtzendorff and Rosien of any salary under said employment contracts.

7. On March 26, 1963, the Housing Authority of the City of Los Angeles discharged defendant Holtzendorff and abolished the position of defendant Rosien.

8. Shortly thereafter, and as a result of the aforesaid illegal employment contracts followed by the discharge of Holtzendorff and Rosien, the Housing Authority of the City of Los Angeles was in disarray and unable to perform its obligations under the United States Housing Act of 1937 and the contracts pursuant thereto in such manner as to promote serviceability, efficiency, economy, and stability. HUD made a determination to this effect.

9. After discussion with the Housing Authority of the City of Los Angeles, HUD determined that the Housing Authority of the City of Los Angeles was in default of its annual contributions contracts in that as a result of the default of the Housing Authority in entering into the aforesaid illegal employment contracts followed by discharge of Holtzendorff and Rosien the projects were not being operated in such manner as to promote serviceability, efficiency, econ-

omy, and stability, and, were it not for the provisions of section 22 of the United States Housing Act of 1937 and section 504 of the annual contributions contracts, annual contributions could not be paid. The Housing Authority of the City of Los Angeles agreed.

10. On April 11, 1963, before 12 m. Pacific Standard Time, the than chief Federal officer of the fedrally assisted low-rent housing program, Marie C. McGuire, took possession of the federally assisted low-rent housing projects of the Housing Authority of the City of Los Angeles, together with all property, real and personal, all rents and revenues, and all powers, rights, and duties of the Housing Authority appertaining to such projects, under section 22 of the United States Housing Act of 1937 and section 501 of the annual contributions contracts pursuant thereto. Prior to 12 m. Pacific Standard Time, the Bank of America N.T.S.A., in which the commercial checking account now in the Union Bank was then on deposit was notified that said chief Federal officer had taken possession of the federally assisted low-rent housing projects of the Housing Authority of the City of Los Angeles, together with all rights, powers, duties, functions, and property appurtenant thereto. The Bank was also notified that no checks or orders on said account should be honored except checks or orders bearing the signatures of the Federal officer in possession.

11. Herman Selvin, attorney for defendants Holtzendorff and Rosien, on April 16, 1963, was informed in writing that Marie C. McGuire, chief Federal officer of the federally assisted low-rent housing program, took possession of the federally assisted projects of the Housing Authority of the City of Los Angeles, on

April 11, 1963, and that any communications with the Authority should be directed to her, attention her designee. On April 16, 1963, in a press conference televised by two Los Angeles stations, Federal representatives made it clear that the Federal Government was in possession of the housing projects of the Housing Authority of the City of Los Angeles, and that all decisions would have to reflect the Federal Government's interests and would be final.

12. On April 18, 1963, a suit styled *Holtzendorff and Rosien v. Housing Authority of the City of Los Angeles,* No. 817825, was filed in the Superior Court of the State of California in and for the County of Los Angeles. By amended complaint Holtzendorff and Rosien sought damages for breach of their employment contracts from the Housing Authority of the City of Los Angeles.

13. No notices, summons, or other legal document on behalf of Barbara Rosien or Howard Holtzendorff was ever served or delivered to HUD or to any officer or employee of HUD in any manner or at any place in the suit styled *Holtzendorff and Rosien v. Housing Authority of the City of Los Angeles,* No. 817025, Superior Court of the State of California for the County of Los Angeles.

14. The residual receipts from the Projects under Contracts SF 95 and SF 113 and in possession of Robert C. Weaver by Robert F. Johnson must be in the hands of the fiscal agent for the bonds issued in connection with such projects by April 16, 1968. Any further amount needed to meet principal and interest on these bonds of the Housing Authority of the City

of Los Angeles must be transmitted by check on the Treasurer of the United States from money appropriated by the Congress of the United States and received by such fiscal agent bank by April 15, 1968. The residual receipts from the operation of such projects are on deposit in the commercial checking account at the Union Bank and are being held and sequestrated pursuant to an order of levy and garnishment issued by the Superior Court of the State of California in and for the County of Los Angeles to enforce a judgment obtained in *Holtzendorff and Rosien v. Housing Authority of the City of Los Angeles*, No. 817285. The residual receipts from the operations of Projects CAL-4-23 and 4-24 are similarly set aside and sequestrated, residual receipts from Projects CAL-4-23 and 4-24 must be turned over to HUD upon notification by HUD any time after January 1, 1968.

15. HUD will be irreparably damaged unless residual receipts from Projects CAL-4-23 and 4-24 are available to it shortly after January 1, 1968. HUD will be irreparably damaged if residual receipts from all projects under SF 95 and SF 113 are not in the hands of the paying agent by April 15, 1968.

16. The assets of the federally assisted projects in possession of Robert C. Weaver by Robert F. Johnson have been wrongfully and illegally charged with payment of the salaries of Howard L. Hotzendorff and Barbara Rosien for the period April 19, 1961 to March 26, 1963, to wit, for Howard L. Hotlzendorff the amount of $42,495.76, for Barbara Rosien, the amount of $32,312.50, which amounts Howard L. Hotzendorff and Barbara Rosien refuse to pay.

WHEREFORE, defendants HUD, Weaver, and Johnson pray that:

1. The court grant judgment declaring that they are entitled to the bank deposits subject to this garnishment proceeding;

2. That this court issue an injunction restraining defendants Holtzendorff and Rosien from enforcing or attempting to enforce the judgment in Superior Court Case No. 817825 by writ of garnishment against the funds now held by plaintiff Union Bank;

3. That the court grant such further relief as may be just and proper.

III. COUNTERCLAIM AND CROSS-CLAIM, PURSUANT TO RULES 13 AND 14, FEDERAL RULES OF CIVIL PROCEDURE AGAINST DEFENDANTS BARBARA AND HOWARD L. HOLTZENDORFF.

By way of counterclaim and cross-claim against the defendants Holtzendorff and Rosien, defendants Department of Housing and Urban Development, Robert C. Weaver, and Robert F. Johnson hereby allege as follows:

1. The United States of America, Department of Housing and Urban Development, Robert C. Weaver, Secretary, (hereinafter referred to as "HUD"), administers the United States Housing Act of 1937, 42 U.S.C. 1401 *et seq.* (hereinafter referred to as USH-Act). Pursuant to the requirements contained in said Act, HUD enteres into contracts (denominated annual contributions contracts) with state public bodies (denominated "housing authorities") for the construction

and administration of low-rent housing projects to house families and the elderly of low income who are unable to obtain decent, safe, and sanitary housing at rents they can afford.

2. The United States of America, Department of Housing and Urban Development, Robert C. Weaver, Secretary, has entered into two such annual contributions contracts, denominated Contracts SF 95 and SF 113 with the Housing Authority of the City of Los Angeles for the development of some 19 low-rent housing projects having an aggregate capital cost of approximately $63,500,000, pursuant to the United States Housing Act of 1937. The United States of America, Department of Housing and Urban Development, Robert C. Weaver, Secretary, has entered into two other contracts denominated Administration Contracts for the operation for low-rent housing purposes of Projects Cal-4-23 and CAL-4-24. The contracts are annexed hereto and made a part hereof as Exhibit 1.

3. On April 19, 1961, the Housing Authority of the City of Los Angeles entered into a contract with Howard L. Holtzendorff for employment. This contract by its terms divested the housing authority of power to administer the housing projects and vested such power in Howard L. Holtzendorff until December 31, 1967, and was null and void and of no effect. Pursuant to said illegal contract for the period April 19, 1961 to March 25, 1963, defendant Holtzendorff was paid $42,495.76 from the assets of the federally assisted projects in possession of Robert C. Weaver by Robert F. Johnson.

4. On April 19, 1961, the Housing Authority of the City of Los Angeles entered into a contract with

Barbara Rosien for employment. This contract by its terms divested the housing authority of the power to administer the housing projects and to vest such power in Barbara Rosien in the absence of Howard L. Holtzendorff until December 31, 1967, and was null and void and of no effect. Pursuant to said illegal contract for the period April 19, 1961 to March 26, 1963, defendant Rosien was paid $32,312.50 from the assets of the federally assisted projects in possession of Robert C. Weaver by Robert F. Johnson.

5. Early in December 1962, representatives of the Housing Authority of the City of Los Angeles verbally informed HUD of the provisions of the employment contracts of April 19, 1961, and forwarded copies of the contracts to HUD on December 6, 1962.

6. The USHAct of 1937 and the annual contributions contracts thereunder between HUD and the Housing Authority of the City of Los Angeles require that the housing authority have power to administer the housing projects in such manner as to promote serviceability, efficiency, economy, and stability. Any divestiture of this power by action of the housing authority constitutes a breach and default under said annual contributions contracts. The divestiture contained in the above employment contracts was *ultra vires* of the USHAct of 1937, and null and void. HUD made determinations to this effect and so advised the housing authority. HUD also advised the housing authority that it would not permit any expenditures of monies derived from operation of the federally assisted low-rent housing projects for payment to defendants Holtzendorff and Rosien of any salary under said employment contracts.

7. On March 26, 1963, the Housing Authority of the City of Los Angeles discharged defendant Holtzendorff and abolished the position of defendant Rosien.

8. Shortly thereafter, and as a result of the aforesaid illegal employment contracts followed by the discharge of Holtzendorff and Rosien, the Housing Authority of the City of Los Angeles was in disarray and unable to perform its obligations under the United States Housing Act of 1937 and the contracts pursuant thereto in such manner as to promote serviceability, efficiency, economy, and stability. HUD made a determination to this effect.

9. After discussion with the Housing Authority of the City of Los Angeles, HUD determined that the Housing Authority of the City of Los Angeles was in default of its annual contributions contracts in that as a result of the default of the Housing Authority in entering into the aforesaid illegal employment contracts followed by discharge of Holtzendorff and Rosien the projects were not being operated in such manner as to promote serviceability, efficiency, economy, and stability, and, were it not for the provisions of section 22 of the United States Housing Act of 1937 and section 504 of the annual contributions contracts, annual contributions could not be paid. The Housing Authority of the City of Los Angeles agreed.

10. On April 11, 1963, before 12 m. Pacific Standard Time, the then chief Federal officer of the federally assisted low-rent housing program, Marie C. McGuire took possession of the federally assisted low-rent housing projects of the Housing Authority of the City of Los Angeles, together with all property, real and personal, all rents and revenues, and all powers, rights,

and duties of the Housing Authority appertaining to such projects, under Section 22 of the United States Housing Act of 1937 and section 501 of the annual contributions contracts pursuant thereto. Prior to 12 m. Pacific Standard Time, the Bank of America N.T.S.A., in which the commercial checking account now in the Union Bank was then on deposit was notified that said chief Federal officer had taken possession of the federally assisted low-rent housing projects of the Housing Authority of the City of Los Angeles, together with all rights, powers, duties, functions, and property appurtenant thereto. The Bank was also notified that no checks or orders on said account should be honored except checks or orders bearing the signature of the Federal officer in possession.

11. Hermon Selvin, attorney for defendants Holtzendorff and Rosien, on April 16, 1963, was informed in writing that Marie C. McGuire, chief Federal officer of the federally assisted low-rent housing program, took possession of the federallly assisted projects of the Housing Authority of the City of Los Angeles, on April 11, 1963, and that any communications with the Authority should be directed to her, attention her designee. On April 16, 1963, in a press conference televised by two Los Angeles stations, Federal representatives made it clear that the Federal Government was in possession of the housing projects of the Housing Authority of the City of Los Angeles, and that all decisions would have to reflect the Federal Government's interests and would be final.

12. On April 18, 1963, a suit styled *Holtzendorff and Rosien v. Housing Authority of the City of Los Angeles,* No. 817285, was filed in the Superior Court

of the State of California in and for the County of Los Angeles. By amended complaint Holtzendorff and Rosien sought damages for breach of their employment contracts from the Housing Authority of the City of Los Angeles. The court in the aforementioned lawsuit awarded a judgment for defendants Holtzendorff and Rosien in the amount of $175,312.76, plus interest of $33.63 per day until paid. An action in garnishment has been filed against plaintiff Union Bank for the armount of said judgment in state court by defendants Holtzendorff and Rosien, which action has been removed to this court.

13. No notices, summons, or other legal document on behalf of Barbara Rosien or Howard Holtzendorff was ever served or delivered to HUD or to any officer or employee of HUD in any manner or at any place in the suit styled *Holtzendorff and Rosien v. Housing Authority of the City of Los Angeles,* No. 817285, Superior Court of the State of California for the County of Los Angeles.

WHEREFORE, defendants HUD, Weaver and Johnson pray that:

1. The court grant judgment in favor of HUD, Weaver and Johnson against Holtzendorff for the amount of $42,495.76, wrongfully paid out to him from the assets of the federally assisted projects in possession of Robert C. Weaver by Robert F. Johnson under the illegal contract with the Housing Authority and against Barbara Rosien for the amount of $32,-312.50 wrongfully paid out to her from the assets of the federally assisted projects in possession of Robert C. Weaver by Robert F. Johnson under the illegal contract with the Housing Authority.

2. That this court issue an injunction restraining defendants Holtzendorff and Rosien from enforcing or attempting to enforce the judgment in Superior Court Case No. 817285 by writ of garnishment or otherwise against the funds now held by plaintiff Union Bank.

3. That the court permanently enjoin defendants Howard L. Holtzendorff and Barbara Rosien from enforcing or attempting to enforce the judgment in state court action No. 817285 out of any funds originating from the United States through defendant HUD.

4. Pending the determination of the claims, counterclaims and cross-claims of defendants HUD, Weaver and Johnson, and to protect its jurisdiction in the premises, that the court issue a preliminary injunction restraining defendants Holtzendorff and Rosien from enforcing or attempting to enforce the judgment in state court action No. 817285 against the funds held by plaintiff Union Bank and subject to the writ of garnishment herein.

5. That the court grant such other relief as may be just and proper.

IV. COUNTERCLAIM AND CROSS-CLAIM PURSUANT TO RULES 13 AND 14, FEDERAL RULES OF CIVIL PROCEDURE AGAINST DEFENDANT HOUSING AUTHORITY OF THE CITY OF LOS ANGELES.

By way of counterclaim and cross-claim against the defendant Housing Authority of the City of Los Angeles, defendants Department of Housing and Urban Development, Robert C. Weaver and Robert F. Johnson hereby alleges as follows:

1. The United States of America, Department of Housing and Urban Development, Robert C. Weaver, Secretary, (hereinafter referred to as "HUD"), administers the United States Housing Act of 1937, 42 U.S.C. 1401 *et seq.* (hereinafter referred to as USH-Act). Pursuant to the requirements contained in said act, HUD enters into contracts (denominated annual contributions contracts) with state public bodies (denominated "housing authorities") for the construction and administration of low-rent housing projects to house families and the elderly of low income who are unable to obtain decent, safe, and sanitary housing at rents they can afford.

2. The United States of America, Department of Housing and Urban Development, Robert C. Weaver, Secretary, has entered into two such annual contributions contracts, denominated Contracts SF 95 and SF-113 with the Housing Authority of the City of Los Angeles for the development of some 19 low-rent housing projects having an aggregate capital cost of approximately $53,500,000, pursuant to the United States Housing Act of 1937. The United States of America, Department of Housing and Urban Development, Robert C. Weaver, Secretary, has entered into two other contracts denominated Administration Contracts for the operation for low-rent housing purposes of Projects CAL-4-23 and CAL-4-24. The contracts are annexed hereto and made a part hereof as Exhibit 1.

3. On April 19, 1961, the Housing Authority of the City of Los Angeles entered into a contract with Howard L. Holtzendorff for employment. This contract by its terms divested the housing authority of power to administer the housing projects and vested

such power in Howard L. Holtzendorff until December 31, 1967, and was null and void and of no effect. Pursuant to said illegal contract for the period April 19, 1961 to March 26, 1963 defendant Holtzendorff was paid $42,495.76 from the assets of the federally assisted projects in possession of Robert C. Weaver by Robert F. Johnson.

4. On April 19, 1961, the Housing Authority of the City of Los Angeles entered into a contract with Barbara Rosien for employment. This contract by its terms divested the housing authority of the power to administer the housing projects and to vest such power in Barbara Rosien in the absence of Howard L. Holtzendorff until December 31, 1967, and was null and void and of no effect. Pursuant to said illegal contract for the period April 19, 1961 to March 26, 1963, defendant Rosien was paid $32,312.50 from the assets of the federally assisted projects in possession of Robert C. Weaver by Robert F. Johnson.

5. Early in December 1962, representatives of the Housing Authority of the City of Los Angeles verbally informed HUD of the provisions of the employment contracts of April 19, 1961, and forwarded copies of the contracts to HUD on December 6, 1962.

6. The USHAct of 1937 and the annual contributions contracts thereunder between HUD and the Housing Authority of the City of Los Angeles require that the housing authority have power to administer the housing projects in such manner as to promote serviceability, efficiency, economy, and stability. Any divesture of this power by action of the housing authority constitutes a breach and default under said annual contributions contracts. The divestiture contained in the

above employment contracts was *ultra vires* of the USHAct of 1937, and null and void. HUD made determinations to this effect and so advised the housing authority. HUD also advised the housing authority that it would not permit any expenditures of monies derived from operation of the federally assisted low-rent housing projects for payment to defendants Holtzendorff and Rosien of any salary under said employment contracts.

7. On March 26, 1963, the Housing Authority of the City of Los Angeles discharged defendant Holtzendorff and abolished the position of defendant Rosien.

8. Shortly thereafter, and as a result of the aforesaid illegal employment contracts followed by the discharge of Holtzendorff and Rosien, the Housing Authority of the City of Los Angeles was in disarray and unable to perform its obligations under the United States Housing Act of 1937 and the contracts pursuant thereto in such manner as to promote serviceability, efficiency, economy, and stability. HUD made a determination to this effect.

9. After discussion with the Housing Authority of the City of Los Angeles, HUD determined that the Housing Authority of the City of Los Angeles was in default of its annual contributions contracts in that as a result of the default of the Housing Authority in entering into the afore-said illegal employment contracts followed by discharge of Holtzendorff and Rosien the projects were not being operated in such manner as to promote serviceability, efficiency, economy, and stability, and, were it not for the provisions of section 22 of the United States Housing Act of 1937 and sec-

tion 504 of the annual contributions contracts, annual contributions could not be paid. The Housing Authority of the City of Los Angeles agreed.

10. On April 11, 1963, before 12 m. Pacific Standard Time, the then chief Federal officer of the federally assisted low-rent housing program, Marie C. McGuire, took possession of the federally assisted low-rent housing projects of the Housing Authority of the City of Los Angeles, together with all property, real and personal, all rents and revenues, and all powers, rights, and duties of the Housing Authority appertaining to such projects, under section 22 of the United States Housing Act of 1937 and section 501 of the annual contributions contracts pursuant thereto. Prior to 12 m. Pacific Standard Time, the Bank of America N.T.S.A., in which the commercial checking account now in the Union Bank was then on deposit was notified that said chief Federal officer had taken possession of the federally assisted low-rent housing projects of the Housing Authority of the City of Los Angeles, together with all rights, powers, duties, functions, and property appurtenant thereto. The Bank was also notified that no checks or orders on said account should be honored except checks or orders bearing the signature of the Federal officer in possession.

11. Herman Selvin, attorney for defendants Holtzendorff and Rosien, on April 16, 1963, was informed in writing that Marie C. McGuire, chief Federal officer of the federally assisted low-rent housing program, took possession of the federally assisted projects of the Housing Authority of the City of Los Angeles, on April 11, 1963, and that any communications with the Authority should be directed to her, attention her

designee. On April 16, 1963, in a press conference televised by two Los Angeles stations, Federal representatives made it clear that the Federal Government was in possession of the housing projects of the Housing Authority of the City of Los Angeles, and that all decisions would have to reflect the Federal Government's interests and would be final.

12. On April 13, 1963, a suit styled *Holtzendorff and Rosien v. Housing Authority of the City of Los Angeles,* No. 817285, was filed in the Superior Court of the State of California in and for the County of Los Angeles. By amended complaint Holtzendorff and Rosien sought damages for breach of their employment contracts from the Housing Authority of the City of Los Angeles. The court in the aforementioned lawsuit awarded a judgment for defendants Holtzendorff and Rosien in the amount of $175,312.76 plus interest of $33.63 per day until paid. An action in garnishment has been filed against plaintiff Union Bank for the amount of said judgment in state court by defendants Holtzendorff and Rosien, which action has been removed to this court.

13. No notices, summons, or other legal document on behalf of Barbara Rosien or Howard Holtzendorff was ever served or delivered to HUD or to any officer or employee of HUD in any manner or at any place in the suit styled *Holtzendorff and Rosien v. Housing Authority of the City* of Los Angeles, No. 817285, Superior Court of the State of California for the County of Los Angeles.

14. The residual receipts from the Projects under contracts SF 95 and SF 113 and in possession of Robert C. Weaver by Robert F. Johnson must be in

the hands of the fiscal agent for the bonds issued in connection with such projects by April 15, 1968. Any further amount needed to meet principal and interest on these bonds of the Housing Authority of the City of Los Angeles must be transmitted by check on the Treasurer of the United States from money appropriated by the Congress of the United States and received by such fiscal agent bank by April 15, 1968. The residual receipts from the operation of such projects are on deposit in the commercial checking account at the Union Bank and are being held and sequestrated pursuant to an order of levy and garnishment issued by the Superior Court of the State of California in and for the County of Los Angeles to enforce a judgment obtained in *Holtzendorff and Rosien v. Housing Authority of the City of Los Angeles,* No. 817285. The residual receipts from the operations of Projects CAL-4-23 and 4-24 are similarly set aside and sequestrated. Residual receipts from Projects CAL-4-23 and CAL-4-24 must be turned over to HUD upon notification by HUD any time after January 1, 1968.

15. HUD will be irreparably damaged unless residual receipts from Projects CAL-4-23 and 4-24 are available to it shortly after January 1, 1968. HUD will be irreparably damaged if residual receipts from all projects under SF 95 and SF 113 are not in the hands of the paying agent by April 15, 1968.

16. Beginning on or about January 15, 1966, the Housing Authority of the City of Los Angeles has repeatedly requested HUD to reconvey possession of the federally assisted low-rent housing projects at Los Angeles to said Housing Authority. Letters and resolutions of said Housing Authority addressed to HUD

have demanded reconveyance and return of such projects to said Housing Authority. HUD, Weaver and Johnson believe they are threatened with suit by the Housing Authority of the City of Los Angeles for the reconveyance of possession of the federally assisted projects to it. Defendants HUD, Weaver and Johnson also believe that if possession is reconveyed to defendant Housing Authority said Housing Authority will satisfy the judgments in state court action No. 817285 out of the funds now held by plaintiff Union Bank which funds are assets of the federally assisted projects now in possession of Robert C. Weaver by Robert F. Johnson.

17. The assets of the federally assisted projects in possession of Robert C. Weaver by Robert F. Johnson have been wrongfully and illegally charged with payment of the salaries of Howard L. Holtzendorff and Barbara Rosien for the period April 19, 1961 to March 26, 1963, to wit, for Howard L. Holtzendorff the amount of $42,495.76; for Barbara Rosien, the amount of $32,312.50, which amounts Howard L. Holtzendorff and Barbar Rosien refuse to pay.

WHEREFORE, defendants HUD, Robert C. Weaver and Robert F. Johnson pray that:

1. The court grant judgment in favor of HUD, Robert C. Weaver and Robert F. Johnson against the Housing Authority of the City of Los Angeles for the amounts of $42,495.76 and $32,312.50, respectively, paid out to defendants Howard L. Holtzendorff and Barbara Rosien from the assets of the federally assisted projects in possession of Robert C. Weaver by Robert F. Johnson under the illegal contracts between those parties.

2. Permanently enjoining defendant Housing Authority of the City of Los Angeles from satisfying the judgment in state court action No. 817285 out of funds originating from the United States through defendant HUD.

3. That the court grant such other relief as may be just and proper.

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